Supreme Court, U. S.
FILED
JAN 28 1974
MICHAEL RODAK, JR., CLERK

No. 73-1162

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 17–24) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 25) was entered on November 28, 1973. On December 20, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to

and including January 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *Harris* v. *United States*, 382 U.S. 162 (involving the refusal of a witness to answer questions before a grand jury), precludes the use of summary contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure when a witness, in disobedience of a court order, refuses to testify at a trial after receiving a grant of immunity.

2. Whether, if the principles of *Harris* are found to govern the instant case, that decision should be overruled.

STATUTES AND RULE INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

28 U.S.C. 1826 provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken

by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Rule 42 of the Federal Rules of Criminal Procedure provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding

at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

1. Pursuant to an indictment returned in the United States District Court for the Southern District of New York, respondent Wilson and one Robert Anderson were charged with armed robbery of the federally insured Empire National Bank in Tuxedo, New York. Anderson was also charged with robbing the Nanuet National Bank in Mount Ivy, New York. A separate indictment also charged respondent Bryan with the Nanuet robbery. Respondents both pleaded guilty to charges in connection with the robberies.

Robert Anderson's case was called to trial in March 1973. At that time, Bryan had been sentenced provisionally to twenty-five years' imprisonment pursuant to 18 U.S.C. 4208(b). Wilson had not yet been sentenced.[1] Respondents were sworn as witnesses in the Anderson trial; however, both refused to answer any questions concerning their acquaintance with Anderson or their participation in the robberies, predicating their refusals on the privilege against self-incrimination. The reason advanced by each respondent for claiming the privilege was a fear that any testimony would adversely affect final disposition of his own

[1] Subsequently, Bryan's sentence was reduced to ten years. Wilson was committed for an indefinite term pursuant to the Youth Corrections Act, 18 U.S.C. 5010(b).

case by informing the sentencing judge of the details of the crimes.[2]

Pursuant to 18 U.S.C. 6002–6003, the trial court conferred immunity upon respondents, ordered them to answer the questions, and warned that failure to answer would constitute contempt of court. The witnesses persisted in their silence, were summarily held in contempt, and were sentenced to terms of six months' imprisonment, to be served consecutively to their sentences on the robbery charges. Execution of the sentences was stayed pending appeal.[3]

2. The court of appeals rejected respondents' claim of Fifth Amendment privilege, finding the grant of immunity to be dispositive and concluding that respondents had failed to follow the proper procedures to raise the issue whether the grant of immunity was coextensive with the privilege in the particular circumstances (App. A, *infra*, pp. 19–22). However, relying on its previous decision in *United States* v. *Marra*, 482 F. 2d 1196, which in turn purported to

[2] The district judge sought to resolve the problem as to Wilson by sentencing him immediately on the robbery charge, but found during allocution that the probation officer had not yet verified his information and that Wilson wished to present a psychologist's report. He therefore deferred sentence. Transcript of March 29 and April 2, 1973, p. 103. (We are lodging copies of the transcripts with the Clerk of this Court.)

[3] Transcript of March 30, 1973, pp. 3–23a; Transcript of March 29 and April 2, 1973, pp. 84–113; App. A, *infra*, pp. 18–19. At the summary contempt proceedings, respondents were represented by Wilson's attorney. She spoke in mitigation of sentence for the contempts but did not object to the summary procedure.

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rely on this Court's opinion in *Harris* v. *United States,* 382 U.S. 162, the court below concluded that respondents' refusal to give testimony at trial could not properly be the subject of summary contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure. Accordingly, the cause was remanded to the district court for proceedings pursuant to Rule 42(b), including a full hearing on the facts of the contempts (App. A, *infra,* pp. 22–24).

REASONS FOR GRANTING THE WRIT

In reversing respondents' summary contempt convictions, the Second Circuit in this case, as in *United States* v. *Marra,* 482 F. 2d 1196 (C.A. 2),[4] unjustifiably extended this Court's ruling in *Harris* v. *United States,* 382 U.S. 162 (involving contempt by a grand jury witness), to a situation to which, in our view, *Harris* has no application. Whatever may be the validity of the *Harris* rule barring availability of summary contempt with respect to a grand jury witness who refuses to testify, similar principles should not govern the case of a witness who, in disobedience of a court order, refuses to testify at trial and thereby inevitably disrupts the trial proceedings. Moreover, the opinion of the court below is in direct conflict in its interpretation of *Harris* with the decision of the First Circuit in *Baker* v. *Eisenstadt,* 456 F. 2d 382, certiorari denied, 409 U.S. 846.[5] This conflict should be resolved.

[4] The government did not petition for certiorari in *Marra* because of mootness problems arising from the fact that Marra had already completed service of his sentence at the time the court of appeals decided that case. No such problem is present here, since respondents have not commenced service of their sentences for contempt.

Should the Court be of the view that this case is factually and legally indistinguishable from *Harris,* it is the government's position that *Harris* was incorrectly decided and should be overruled. In either event, this case presents important issues involving the proper enforcement of the contempt power which should be resolved by this Court.

1. In *Harris,* this Court held that when a witness refuses after a grant of immunity to answer material questions before a grand jury and repeats the refusal before a judge, the contempt can be punished only after notice and hearing, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. In articulating the rationale for its ruling, the Court stated (382 U.S. at 164–165):

> Cases of the kind involved here are foreign to Rule 42(a). The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify "committed in the actual presence of the court" for the purposes of Rule 42(a). It served no other purpose, for the witness had been adamant and had made his posi-

[5] The decision of the Second Circuit is also in conflict with the holding of the Sixth Circuit in *United States* v. *Seavers,* 472 F. 2d 607, 611. There, although the summary nature of the proceedings was not directly challenged, the court affirmed the use of summary criminal contempt against a witness who refused to testify at the trial of his accomplice.

> tion known. The appearance before the District Court was not a new and different proceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it. Even though we assume *arguendo* that Rule 42(a) may at times reach testimonial episodes, nothing in this case indicates that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, was necessary. [Citation omitted.]

Whatever the vitality of the prohibition against summary contempt proceedings for a witness's refusals to answer questions before a grand jury, such refusals at trial in the presence of the court are precisely the kind of conduct as to which "speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.'" *Harris* v. *United States, supra,* 382 U.S. at 164. In the present case, the witnesses' refusals to testify resulted in disruption of the proceedings through delay, and, indeed, the refusal of the respondent Bryan resulted in the collapse of the prosecution's case against Anderson for the Nanuet bank robbery.[6]

The instant case is but one of several recent decisions in which the Second Circuit has incorrectly expanded *Harris* to prohibit summary contempt proceed-

[6] In acquitting Anderson of the three Nanuet counts at the close of the government's case, the trial judge remarked to the prosecutor, "of course, your case has been substantially weakened through no fault of your own by the refusal of Mr. Bryan to testify * * *." Transcript of March 29 and April 2, 1973, pp. 158, 162.

ings where a witness has refused to testify at trial. See *United States* v. *Pace,* 371 F. 2d 810, 811, and *United States* v. *Marra,* 482 F. 2d 119[illegible] (expressly relied upon below). These decisions are directly contrary to the decision of the First Circuit in *Baker* v. *Eisenstadt,* 456 F. 2d 382, certiorari denied, 409 U.S. 846, which expressly criticized *Pace* and reaffirmed the rule that "refusal to answer in the 'actual presence' of the court can be * * * dealt with [summarily]" (456 F. 2d at 388).[7] See also *United States* v. *Seavers,* 472 F. 2d 607 (C.A. 6), discussed at n. 5, *supra.*

Both *Seavers* and *Baker* recognize that the fundamental difference between the summary proceedings under Rule 42(a) and the notice and hearing provisions of Rule 42(b) is simply whether the contumacious conduct occurred in the presence of the court. Where, as here, the testimonial refusal occurred at trial, the court is aware of the circumstances surrounding the act and no purpose is served by notice and hearing.[8] In such circumstances due process does not require a hearing. *Groppi* v. *Leslie,* 404 U.S. 496;

[7] *Baker* v. *Eisenstadt* involved *habeas corpus* review of summary contempt proceedings of a state court. The court of appeals found Rule 42(a) reflective of the common law principles relating to criminal contempt, and it is clear that the court's holding is applicable with equal force to federal proceedings expressly governed by Rule 42(a).

[8] Moreover, in the present case respondents in fact were warned by the court that continued refusal to answer questions would result in contempt. Respondents were also afforded ample opportunity to explain the basis of their refusals to testify (*see* pp. 6–7, *supra*). In these circumstances, it is clear that no interests would have been served by further notice and hearing.

Johnson v. *Mississippi*, 403 U.S. 212, 214–215; *Bloom* v. *Illinois*, 391 U.S. 194, 205; *Cooke* v. *United States*, 267 U.S. 517, 534, 537.

Nothing in *Harris* requires a different result. There, the misconduct which formed the basis for contempt occurred before a grand jury, and the majority in *Harris* found that the act of bringing the witness before the court was ineffective to bring the conduct within Rule 42(a) as "committed in the actual presence of the court." Subsequent to the *Harris* decision, this Court has indicated that it is the commission of the contempt in the presence of the court which warrants summary proceedings. *Groppi* v. *Leslie*, *supra*, 404 U.S. at 504–505. Implicit in this principle is the conclusion that *Harris* must be confined to cases where the contempt occurred outside the court's presence.

The power of a court to compel testimony by a recalcitrant witness is a well-recognized necessity. See, *e.g.*, *Shillitani* v. *United States*, 384 U.S. 364, 370; *United States* v. *Bryan*, 339 U.S. 323, 331. Indeed, the court below observed that "[o]ne of the major purposes of [the immunity statute] was to prevent what occurred in this case: the refusal of accomplices to testify about a crime, thereby aborting a conviction" (App. A, *infra*, p. 20). Although respondents were convicted of criminal (rather than civil) contempts of the court's authority, the coercive and deterrent aspect of the contempt sanction in the criminal form should not be overlooked. Many a witness who would draw back from engaging in contumacious disobedience of judicial authority if he knew that swift and certain punishment would ensue might,

conversely, be fortified in his obstinacy by deferral of the time of reckoning. In the context of a criminal trial, this enhanced possibility that critical testimony may be lost can jeopardize the integrity of the truth-finding process—a risk that is ordinarily diminished, if not eliminated, by the greater longevity of grand jury proceedings.

The important differences between grand jury proceedings and criminal trials, in relation to the question of the proper procedures for dealing with contempts, appear to have been overlooked or misunderstood by the court below. The life of a grand jury is anywhere from 30 days to 18 months; the normal criminal trial lasts only a few days. Thus, the "coercive" sanction of civil contempt, which may well prove effective with a recalcitrant grand jury witness and which the Second Circuit has suggested be utilized prior to resort to criminal contempt proceedings under Rule 42 in the context of a trial (*United States* v. *Marra*, *supra*, 482 F. 2d at 1201), is likely to be wholly ineffective in all but the most complex and lengthy trials.[9] Moreover, the delay of a few days that may be necessitated by compliance with Rule 42(b) procedures, while unlikely seriously to disrupt the activities of a grand jury (except when it is nearing the end of its term), may have substantial disruptive effects in the ordinary trial. It was as a result

[9] Indeed, in this very case the remedy of civil contempt would have been futile, since respondents were already incarcerated at the time of their refusals to testify. Transcript of March 30, 1973, p. 22; Transcript of March 29 and April 2, 1973, p. 87.

of its oversight of these important pragmatic distinctions that the court below was able to conclude that contumacious refusals to testify during the course of a trial are covered by the *Harris* decision.

2. Should this Court, notwithstanding the foregoing arguments relating to the distinctions between the grand jury and trial contexts, conclude that the holding of *Harris* is equally applicable to both contexts, we submit that the Court should then consider the question whether *Harris* should be overruled. We need not repeat here the argument on the merits of that issue, which have already been made on the government's behalf in connection with the litigation of the *Harris* case and of its predecessor, *Brown* v. *United States,* 359 U.S. 41, which *Harris* overruled. We note only that the continuing vitality of *Harris* may be considered to be in some doubt as a result of the approving citation of *Brown* in *Groppi* v. *Leslie, supra,* 404 U.S. at 504–505. As the Chief Justice there stated immediately prior to the citation:

> Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. [Footnote omitted.]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1974.

APPENDIX A

United States Court of Appeals for the Second Circuit

(Nos. 83, 101—September Term, 1973)

(Argued October 15, 1973

Decided November 28, 1973.)

Docket Nos. 73–1574, 73–1575

UNITED STATES OF AMERICA, APPELLEE

against

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN, APPELLANTS

Before: LUMBARD, FRIENDLY AND FEINBERG, *Circuit Judges.*

Appeal from judgments of the United States District Court for the Southern District of New York, Morris E. Lasker, *J.*, finding appellants guilty of criminal contempt for refusing to testify, on self-incrimination grounds, despite grants of immunity.

Reversed and remanded.

SHEILA GINSBERG, New York, N.Y. (Robert Kasanof, The Legal Aid Society, on the brief), *for Appellant Wilson.*

HERBERT IRA HANDMAN, New York, N.Y., *for Appellant Bryan.*

KENNETH R. FEINBERG, Assistant United States Attorney (Paul J. Curran, United States Attorney

for the Southern District of New York; John D. Gordan III, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Thomas Joseph Wilson and Bobby Antonio Bryan appeal from judgments of the United States District Court for the Southern District of New York, Morris E. Lasker, *J.*, finding them guilty of criminal contempt for refusing to testify in the trial of Robert Joel Anderson for armed bank robbery. Both Wilson and Bryan were sentenced by Judge Lasker to six months imprisonment. They challenge their contempt convictions, arguing that they had the right to refuse to incriminate themselves and that, in any event, the procedure followed by the judge was defective. For reasons set forth below, we reject the fifth amendment claim but reverse for further proceedings before Judge Lasker under Rule 42(b) of the Federal Rules of Criminal Procedure.

I

The indictment on which Anderson was tried charged him with armed robbery of the Nanuet National Bank in Mt. Ivy, New York, and the Empire National Bank in Tuxedo, New York. The same indictment charged appellant Wilson, too, with robbery of the latter bank. This case was assigned to Judge Lasker. A separate indictment also charged appellant Bryan with the Nanuet bank robbery. This indictment was assigned to Judge Irving Ben Cooper. By the time Anderson's case came to trial before Judge Lasker in March 1973, both appellant Wilson and appellant Bryan had pleaded guilty to charges against them. However, neither had been definitively sentenced. Wilson's plea had been taken by Judge Lasker, who had deferred sentence.[1] Bryan had pleaded before Judge Cooper, who had imposed a provisional 25-year sentence (the statutory maximum), pending an evaluation under 18 U.S.C. § 4208(b).[2]

During Anderson's trial, the Government called appellants Bryan and Wilson as witnesses, the former on the Nanuet, and the latter on the Empire, bank robbery. Each refused to testify on self-incrimination grounds and persisted in this stance even though each received immunity under 18 U.S.C. §§ 6002–03, and the judge warned that a contempt finding would follow. When Wilson and Bryan continued to balk, Judge Lasker immediately found each one separately in contempt, and sentenced both to six months in prison consecutive to whatever sentences they received on the counts to which they had pleaded guilty. Counsel for Wilson was present throughout and, in the absence of counsel for Bryan, she attempted with the court's sanction to represent the latter as well.

II

As previously noted, at the time appellants were called as witnesses in the trial of Anderson, they had not yet been finally sentenced in their own guilty pleas. Their uncertainty as to the eventual sentences forms the basis for their broadest argument on appeal. They claim that any admission by them of the details of participation in armed robbery might weigh against them

[1] On June 1, 1973, the judge committed Wilson as a Young Adult Offender for an indeterminate term under 18 U.S.C. § 5010(b), as extended by 18 U.S.C. § 4209.

[2] On August 14, 1973, after Anderson's trial, and after receipt of a report under 18 U.S.C. § 4208(b), Judge Cooper reduced Bryan's sentence to ten years.

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with the sentencing judge—in Wilson's case, the very judge who would hear the testimony, and in Bryan's, a judge of the same court could obtain the transcript. The Government responds that the privilege against self-incrimination ends immediately and completely with a guilty plea and that, in any event, the claim of privilege was not justified on these facts. Although the first argument raises substantial issues [3] and there is much to commend the second, [4] we need not deal with either. The grant of immunity under 18 U.S.C. §§ 6002–03 is dispositive here.

One of the major purposes of that statute was to prevent what occurred in this case: the refusal of accomplices to testify about a crime, thereby aborting a conviction. (Indeed, Bryan succeeded admirably—if

[3] None of the cases cited by the Government hold that a guilty plea immediately and completely ends the privileges even though sentence has not yet been imposed. The statement in *United States* v. *Sanchez*, 459 F. 2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 864 (1972), relied on by the Government, was made without discussion; the dispositive factor was that the witness had not even been called. Although *United States* v. *Gernie*, 252 F. 2d 664, 670 (2d Cir.), cert. denied, 356 U.S. 968 (1958), contains a similar statement, the witness in that case had already been sentenced. Cf. *United States ex rel. Sniffen* v. *Follette*, 439 F. 2d 1082, 1083–84 (2d Cir. 1971). But cf. *United States* v. *Solafani*, slip op. 4479, 4488–91 (2d Cir. June 27, 1973), cert. denied, 42 U.S.L.W. 3284 (U.S. Nov. 13, 1973). See generally McCormick on Evidence § 121 (2d ed. 1972 for the proposition that—at least when there has been a conviction after a trial rather than after a guilty plea—the privilege continues not only until after sentencing but also until after the time for appeal as of right has expired.

[4] The record shows, and oral argument substantiated, that Wilson refused to testify out of "adolescent loyalty" in order "to save a friend"—a motive possibly shared by Bryan, who had already been provisionally sentenced. Moreover, Wilson had earlier told the details of his complicity in the crime to the presentence investigator from the Probation Office.

that was his motive—since the Nanuet bank robbery counts were, without his testimony, dismissed at the close of the Government's case.) Because of the asserted danger of adverse use of the compelled testimony in sentencing, however, appellants contend that the immunity given was not coextensive, as is required, with the scope of the fifth amendment privilege. *Kastigar* v. *United States*, 406 U.S. 441, 449 (1972). But neither Wilson nor Bryan followed what we deemed to be proper procedure in raising the issue of "forbidden use." [5] If appellant Wilson doubted the ability of Judge Lasker to put out of his mind Wilson's statements at Anderson's trial, he should nevertheless have testified as ordered, but requested a different judge for sentencing on the robbery charge.[6] Cf. *United States* v. *Goldberg*, 472 F. 2d 513, 516 (2d Cir. 1973). Similarly, if Bryan genuinely feared an increased sentence on his guilty plea as a result of testifying in the *Anderson* case, he, too, should have given evidence, then asked that proper precautions be taken (e.g., sealing the record) to insure that Judge Cooper would not be privy to the statements made under grant of immunity. Both were, however, required to obey the mandate of 18 U.S.C. § 6002 that "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. . . ." Since appellants, on the contrary, selected a wholly improper means of testing their constitutional claim the contempt judgments would stand regardless of the true extent of the privilege (an issue we need not reach), were it not for the fact that the trial judge erred pro-

[5] We do not decide that the potential uses would have been "forbidden."

[6] Wilson's default in this respect is another factor that casts in doubt the legitimacy of his invocation of privilege. See note 4 supra and accompanying text.

cedurally in arriving at his findings. To this additional problem we now direct our attention.

III

Our recent opinion in *United States* v. *Marra*, 482 F. 2d 1196 (1973), held that use of the summary criminal contempt sanction of Fed. R. Crim. P. 42(a) was inappropriate in the case of an orderly refusal to testify on fifth amendment grounds despite a grant of immunity. The proper course would have been to proceed under subdivision (b) of the Rule, which calls for disposition on notice and hearing, permitting "a reasonable time for the preparation of the defense."[1] Since the district judge here immediately found both Wilson and Bryan in contempt upon their

[1] Fed. R. Crim. P. 42 provides:

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment."

separate orderly refusals to answer the prosecution's questions, appellants argue that *Marra* governs, and compels reversal of the judgements. We agree, and therefore remand for further proceedings pursuant to Rule 42(b).

At the outset, appellee contends that the failure of appellants to object to the summary procedure below bars them from raising the claim on appeal. We hold, however, that under the circumstances, the request by counsel for Wilson for more time to research the fifth amendment issue constituted sufficient objection. And we refuse to penalize appellant Bryan for his failure to make timely objection to the Rule 42(a) proceeding, since his own counsel was not present. Although counsel for Wilson did her best to protect Bryan, the court having sanctioned her efforts in this regard, only a defendant's own lawyer could be fully aware of the considerations which might be raised in his behalf to mitigate a charge of contempt or the sentence thereunder, and of the likely usefulness of a hearing for development of these considerations.

Appellee also contends, in an effort to distinguish *Marra*, that Bryan and Wilson received the substance, if not the form, of a Rule 42(b) proceeding since both were represented by counsel and given a full opportunity to be heard. Mere presence of counsel, however, even had it been each defendant's own counsel, would not be determinative. In *Harris* v. *United States*, 382 U.S. 162 (1965), upon which *Marra* relies, counsel was also present.

Nor is the bare "opportunity to be heard" dispositive here since the "hearing" was confined to the matter of sentence. If, however, counsel had been given "a reasonable time for the preparation of the defense," Fed. R. Crim. P. 42(b); she might have marshalled and presented facts in mitigation of the charge. Sig-

nificantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson." Shortly thereafter, nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing.

Accordingly, since *United States* v. *Marra, supra,* controls, we reverse the judgments of contempt and remand for further proceedings pursuant to Rule 42(b).

APPENDIX B

United States Court of Appeals for the Second Circuit

[caption omitted]

JUDGMENT

Judgments reversed and that the actions be and they hereby are remanded to said district court for further proceedings in accordance with the opinion of this Court.

NOVEMBER 28, 1973.

(25)

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,
Petitioner

—v.—

THOMAS JOSEPH WILSON and BOBBY ANTONIO BRYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
JANUARY 28, 1974
CERTIORARI GRANTED MAY 13, 1974

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2- 7-73	Filed Indictment
2- 9-73	Pleadings adj. to 2-13-73 at 10:30 AM as to both defts.
	Both defts. continued remanded in lieu of bail fixed by Magistrate:
	Anderson $20,000. cash or surety—Wilson $50,000. cash or surety.—Tyler, J.
2-13-73	T.J. Wilson—Deft. (Atty. present) pleads not guilty. Bail fixed at $25,000.
	P.R.B. secured by 10% cash. Remanded in lieu of bail.
	Case assigned to Judge Lasker.—Stewart, J.
3- 6-73	Deft. Wilson—psychiatric examination ordered. Lasker, J.
3- 7-73	Wilson—Filed Order to employ the services of Dr. George Hamilton Wilke, to examine deft. to determine his mental competency.
3-21-73	Deft. Wilson (atty. present) withdraws his plea of not guilty and pleads guilty to counts 5 and 6. Pre-sentence investigation ordered. Sentence adjourned to May 4, 1973. Lasker, J.
3-29-73	Trial begun, Jury impanelled before Lasker, J. (DEFT ANDERSON)
3-30-73	Trial Cont'd.
4- 2-73	Trial cont'd
4- 2-73	Bobby Antonio Bryan being called as a witness is granted immunity by the Court and paid [sic] witness refusing to testify after being directed by the Court to do so is held in contempt of Court and sentenced to a term of imprisonment for a

DATE	PROCEEDINGS
4- 2-73	period of 6 months pur. to Ti. 18 U.S.C. Sec. 402, to be served consecutively to the term of imprisonment imposed in 72 Cr 1190. Stayed pending appeal.
	Thomas Joseph Wilson being called as a witness is granted immunity by the Court and said witness refusing to testify after being directed by the Court to do so is held in contempt of Court and sentenced to 6 months imprisonment purs. to Ti. 18 U.S.C. Sec. 402, to be served consecutively to any term of imprisonment which shall be imposed in this case as a result of deft having pleaded guilty herein-Execution of sentence stayed pending appeal. Lasker, J.
4- 3-73	Trial cont'd-jury unable to reach a verdict, Mistrial declared Jury discharged. Lasker, J.
4- 6-73	Bobby Antonio Bryan a witness—Filed notice of appeal to the USCA for the 2nd Circuit from Judgment dated 3-30-73—appl. to proceed in forma pauperis is granted—Lasker, J. (mailed copies to deft. and US Atty.)
4- 6-73	Thomas Joseph Wilson (as a witness)—Filed notice of appeal from judgment dated 3-30-73—appl. to proceed in forma pauperis is granted—Lasker, J. (mailed copies to deft. and US Atty's office)
4-20-73	*Filed Transcript of record of proceedings, dated* 3-30-73

A TRUE COPY
THOMAS E. ANDREWS
Acting Clerk

By /s/ [Illegible]
Deputy Clerk

EXCERPTS OF TRANSCRIPT OF MARCH 29 AND APRIL 2, 1973

[84]

• • • •

THE COURT: I received from Mr. Feinberg what he represents to be a teletype received from the United States Attorney's office, is that correct?

[85] MR. FEINBERG: That's correct.

THE COURT: The substance of which is the same except it applies to Mr. Wilson, the present witness, as was the substance of Court Exhibit 1, which related to Mr. Bryan. Was it Bryan?

MR. FEINBERG: Yes.

THE COURT: Namely, authorization to confer immunity from prosecution for such testimony as will be given in regard to this case or anything growing out of it.

I will have this exhibit made Court's Exhibit 4.

(Court's Exhibit 4 marked.)

MRS. HERMANN: Judge, before we proceed with this matter I understood that the Court was considering the possibility of imposing sentence on this case.

THE COURT: I may do that if I find that it is necessary, yes. Perhaps.

I haven't yet heard from the witness what his position is.

MR. FEINBERG: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Wilson, do you know the defendant Robert Joel Anderson?

A I refuse to answer on the grounds it might incriminate [86] me.

THE COURT: Do you intend, Mr. Wilson, to refuse to answer further questions put to you with regard to Mr. Anderson or the case in which he is charged with robbing the Empire National Bank on January 26, 1973?

THE WITNESS: Yes, sir.

THE COURT: All right. I think that I will have to adjourn the proceedings for a few minutes because one of the relevant legal considerations that has been raised in the past and which as might as well be eliminated from the record, is the question of whether the witness has or has not been sentenced on his plea of guilty. This witness has not been sentenced, but I have spoken to the probation officer, who has told me he is available to render a pre-sentence report, and I am prepared knowing what he has already told me, to impose sentence as soon as the probation officer in the presence of Mrs. Hermann and Mr. Wilson, gives his report.

After I have done that, we will proceed.

MRS. HERMANN: May I make two objections for the record before we proceed.

The first would be that Mr. Wilson is not lawfully before this Court, having never been served with a subpoena as required under the Federal rules of criminal procedure and had he been so served, I would have objected to the [87] validity of such service because I believe the position that he is now placed in before the Court so jeopardizes him in connection with his criminal case that due process for bids is even being subpoenaed, let alone confronted with the question of whether he will or will not testify in this case.

THE COURT: Very well.

MR. FEINBERG: Your Honor, I would say that the Government disagrees entirely with what Mrs. Hermann has represented here. He has not been served. However, for the record I note that Mr. Wilson is currently in custody, having plead guilty to this charge and is awaiting sentence this afternoon, and was brought over by the marshals.

THE COURT: I think that the question of not having been served could be cured by your applying, if you wish, for a writ of habeas corpus ad testificandum.

If you make such application, I would grant it.

With regard to the other questions that Mrs. Hermann raises, they will be part of whatever issue is appealed to

the Court of Appeals in case my ultimate ruling is adverse.

MRS. HERMANN: May I make a second very brief statement for the record. That is that Mr. Feinberg, the plea in this case was originally scheduled for yesterday, March 29.

THE COURT: Whose plea?

[88] MRS. HERMANN: The plea by Mr. Wilson. The resolution of Mr. Wilson's criminal charges was originally scheduled for March 29. At the request of Mr. Feinberg it was moved up so that the plea was, in fact, entered on March 21. I believe that that was done in order so that Mr. Feinberg would create the instant situation. I did not have notice of the developments in this case regarding the possibility of the testimony and immunity until the afternoon of March 28 and I feel that the matters concerning whether or not Mr. Wilson can be compelled to testify in this case are extremely complicated questions of law, which the time involved in this case has really prevented me from adequately researching.

I would therefore move for a continuance of this entire matter because we really have a person here faced with very serious criminal penalties should it result that he eventually is held in contempt of Court and that this should not be a matter which is so hastily determined.

MR. FEINBERG: Your Honor, if I may reply to this. As your Honor knows from Court Exhibits 1 and 4, the Government has moved with great haste in this matter having decided that immunity must be granted. We have not even filed the normal forms with Washington. We have gone over the teletype in an effort to get the immunity on—

THE COURT: That is precisely what Mrs. Hermann is [89] saying.

MR. FEINBERG: The point I wish to make is that this was not known on the 21st of March when Mrs. Hermann implies that I did this precisely for this reason. That is entirely and totally false.

THE COURT: It seems to me without going further into the matter that any defendant and any lawyer for

any defendant must at least be partially aware that if the defendant proposes to plead guilty he might be called as a witness against a co-defendant or in relation to the actions of this crime.

That is one of the results, once somebody has pleaded guilty. It is a normal result to a plea of guilty.

I see no reason to defer the matter here, Mrs. Hermann. I don't mean for a minute to minimize your sincerity in believing that these issues are complex and I indicated this morning that I think they are unsettled, I agree with you, but I don't think any harm is going to come to this defendant either in the final analysis. I think we cannot delay this trial. I cannot delay it. I have many other matters that are equally important to the people concerned in those cases which are following.

The chief reason why this case came to trial as quickly as it did was for the benefit of the defendants in [90] the sense that neither one of them had been able to furnish bail and they, therefore, had a prior right to go to trial. I am prepared to see to it that the trial is completed and terminated.

MR. KAHN: I just merely want to note my objection for the record in that the defendant Anderson views the sentencing—the unscheduled sentencing, should it occur, by your Honor of Mr. Wilson as premature in this matter. That is all I want to say for the record so that the record is clear and it is prejudicial to this defendant Anderson.

THE COURT: All right.

As soon as the probation officer arrives, will you please let me know, Mr. Clerk.

(Short recess.)

(In open court without the presence of the jury.)

MRS. HERMANN: Your Honor, while we are waiting for the probation officer, may I say—

THE COURT: He is here.

Is there something you want to add to the previous discussion?

MRS. HERMANN: Yes, it is my understanding from the proceedings this morning that really Mr. Wilson's testimony would be cumulative in nature in this case and does not add any necessary element to the Government's case.

[91] THE COURT: I cannot agree with that, if he should testify that Mr. Anderson was present at the scene of the crime, that would be certainly different as a key defendant saying that than somebody else saying that.

I cannot agree with you.

MRS. HERMANN: I would also object to the premature sentence in Mr. Wilson's case on the grounds that it is taking place under the most coercive and prejudicial circumstances, where Mr. Wilson stands before you on sentence sitting in a witness box—

THE COURT: I think you are right. I think we should clear the courtroom and proceed in normal fashion.

If all of you except Mr. Feinberg and Mr. Linden, that is all who are participating in the proceedings will go to the back of the room, Mr. Anderson, I guess you will have to stay with a guard and Mr. Wilson will you and Mrs. Hermann please take the position at the normal defense table.

Be seated. Is there anything further? I recognize and there is no question about it that I am sentencing—about to sentence Mr. Wilson slightly earlier than had been planned and, on the other hand, I expect to proceed with the same general type of information that I would have had at the appropriate time.

I have asked Mr. Linden, the probation officer to be [92] present here and to report to me on such material as he has that is relevant to Mr. Wilson's defense.

Mr. Linden, would you tell me what you have to do that would be included in a presentence report on Mr. Wilson?

MR. LINDEN: Your Honor, we have spoken to Mr. Wilson. We haven't had a chance to verify the things he has told us.

According to the fingerprint, the FBI sheet that I have, he has been arrested a number of times. The first dated

February 17, 1971, which case was dismissed and that was a charge of resisting arrest and harrassment. That took place in New City, New York.

THE COURT: Are there any prior convictions?

MR. LINDEN: There is a prior conviction based on an arrested dated June 20, 1971 on a charge of assault and to which the defendant pleaded guilty and was sentenced to a five month sentence in January of 1972, according to him.

There is an arrest dated November 11, 1971 in San Francisco, California on a charge of shoplifting upon which he was sentenced to a suspended sentence in a local court in San Francisco.

There is one other arrest and acquittal. We have not had the opportunity to make any further checks on his prior record.

[93] THE COURT: Have you met with any members of Mr. Wilson's family? Do you have anything to report about his family background?

MR. LINDEN: Only what he has told us at this time.

THE COURT: Which is?

MR. LINDEN: He tells us that he was born July 10, 1951 in the Brong.

He tells us that his father is Donald and that his mother is Teresa, maiden name is Ryan. Is father is 52 years of age. Resides in the present family home with his mother at 58 McKinley Street in Pearl River, New York, where the family owns their own home and have done so for the past 15 years.

His father, he tells me—he tells me everything that I am reporting—his father is a college graduate who is employed in the business office of a local Lederly Laboratories in Pearl River.

He tells us that he has three—he tells us that his mother is a housewife who also works as a teacher's aid for the Pearl River School System. He tells us that he has three brothers ranging in age 18 to 14, therefore he would be the oldest.

He tells us he is single and that he is childless and that he has been living away from the home since the age [94] of 18.

THE COURT: How old is he now?

MR. LINDEN: He was born in 1951, he is now 21.

THE COURT: Possibly 22, I guess.

MRS. HERMANN: He is still 21, your Honor.

THE COURT: 21.

MR. LINDEN: He tells us that he graduated from Pearl River High School in 1969 and that he very briefly attended the Rockland Community College without receiving any credit for his courses taken.

He tells us that he is in good health; that he has occasionally used marijuana.

He has told us that for the past two and a half years he has not had steady work. He has had odd jobs such as house painting and at one time drove a cab for a number of months.

He at one time claims to have worked—he claims to have worked at one time for five months in 1970 for a construction company in Mount Kisco, New York. He tells us that his vocational plans are in restaurant management. This would be an employment goal of his he tells us.

He tells us he enlisted in the United States Navy on July 15, 1969 and was honorably discharged April 15, 1970 with the rank of seaman, basic seaman E-3.

[95] He volunteered that he was awol a number of times and made a poor adjustment to the Navy.

He tells us he is without assets or formal financial obligations.

THE COURT: Did you question him at all with regard to the crime itself?

MR. LINDEN: Yes.

THE COURT: Do you have anything to report in that regard?

MR. LINDEN: Yes, I do.

Mr. Wilson told us that on the date that this case transpired he had been alone in a local donut shop and he had met someone there who he can only identify by the name of Billy.

He had previously met him at a party.

Billy offered that both he and Wilson could make some money if Wilson went along with him. They got into a car which Wilson was driving, which was owned by a rental agency and another friend of his had rented it, a William Fisher of Spring Valley.

In the car Billy told him that they were going to rob a bank and they proceeded to a bank in Tuxedo on Route 17.

Wilson said they walked into the bank and his friend Billy pulled out a gun. Billy announced that this was [96] a stickup.

Defendant Wilson tied up the man and woman in the bank. Billy took the money and they both left. They got into the car and while they were driving in the Lake Welsch Area they were spotted by police who gave chase.

He said the car hit an abutment, a wall of some kind, and turned over.

Wilson lapsed into a semi-conscious state and ran into the woods where he was found. The money was recovered in the car. He has been in jail ever since.

He also indicated as a result of this accident he broke a finger and had some damage to his arm. He claimed that a policeman who arrested him hit him with a club resulting in a broken arm.

He said he was treated at Nyack Hospital and then taken into Federal custody.

He claimed that whatever admissions he made were made under the influence of morphine which was administered to him at the hospital he believes.

THE COURT: Thank you, Mr. Linden.

Mr. Feinberg, as you know, I took the plea of Mr. Wilson in this case. I have now heard this additional information. Of course I have sat this morning and heard the testimony of the witnesses with regard to this robbery. Is [97] there anything that the Government wishes to add to the situation at this time?

MR. FEINBERG: The Government has nothing to add at this time.

THE COURT: Mrs. Hermann.

MRS. HERMANN: Yes, your Honor.

I feel a little uncomfartable under these circumstances. My normal practice when a defendant of mine is going to be sentenced to spend time working with the probation officer and helping him verify information and giving him additional information in hopes of creating the most favorable possible atmosphere.

THE COURT: Do you know of any information that could be given to me or Mr. Linden that would improve my attitude?

MRS. HERMANN: The most important thing I think is the report from Dr. Wilke. Dr. Wilke is a psychiatrist who examined Mr. Wilson to determine if he were competent to stand trial at your Honor's request.

THE COURT: At my orders.

MRS. HERMANN: What I would have thought might have been helpful would have been further investigation into the breach between defendant and his family, which defendant has told me about and which I will tell the Court about at this [98] point to try to verify that more completely because I think that is the source of all the troubles in the defendant's life.

Mr. Wilson's life.

Mr. Wilson is 21 years of age. He grew up in upstate New York in a highly educated, very strict Catholic family.

His difficulties with his family started in approximately the 7th grade. Up to that point he had attended a parochial high school.

THE COURT: I assume all the information you have comes from Mr. Wilson?

MRS. HERMANN: That's correct, your Honor.

When he went on and left the parochial high school and went into regular high school he started growing his hair longer and this seems to become a symbolic bone of contention between him and his parents.

THE COURT: I thoroughly understand that. I have been through the same thing myself.

MRS. HERMANN: I hope not to the extent—because what happened to Mr. Wilson—

THE COURT: No, I mean I understand that fathers and sons or mothers and sons have strong differences about these things and they can lead to a lot of friction in the [99] family.

MRS. HERMANN: What ultimately happened is that Mr. Wilson—

THE COURT: Mr. Wilson's hair is nearly as long as my son's was.

MRS. HERMANN: Mr. Wilson has told me a story which I would like to tell the Court to illustrate the spirit of the sort of relationship he had with his parents.

A number of years ago when his grandmother died and he and his grandmother were very close, about as close as he was to any of his relatives and his mother refused to let him attend the funeral because of his hair, and this to him is a very symbolic incident in what his childhood was like.

When he graduated from high school, I gather a lot of suggesting and prompting from his father, he enlisted in the Navy. He was honorably discharged under medical conditions because he just absolutely could not adjust to the Navy.

At that point he was basically disowned by his family. That is why he has been on his own since he was 18.

THE COURT: Mrs. Hermann, I am interested in what you are saying. If I were to follow your suggestion that these matters be looked into in greater detail, how would you recom- [100] mend I go about that?

There are two possible courses, it seems to me. One is to send Mr. Wilson back to the doctor for further discussions on this kind of thing and I don't know whether the law, frankly, permits providing a course of psychiatry to prisoners in these situations.

The other would be to impose sentence under 4208C as was done in the case of Mr. Bryan and permit the Government authorities to make an investigation bearing in mind, what you have said.

MRS. HERMANN: Frankly, I was hoping that the Court would follow neither of those two courses.

THE COURT: That is what I want to know. Do you have any other idea?

MRS. HERMANN: And would basically accept Mr. Wilsons representation about his childhood, which Dr. Wilke does discuss.

The reason I am going on about this is because Dr. Wilke's report, which I think is very revealing about the character of the defendant, which is one of the major factors I hope the Court will consider in imposing sentence today, Dr. Wilke really saw this drastic breach between defendant and his family as causing in the defendant a feeling that he was an unworthy and hopeless individual and Dr. Wilke [101] basically perceived Mr. Wilson to be what he stated to be a juncture of crossroads in his life where he might for the past several years Mr. Wilson has sort of been shifting from one thing to another, he gave a try at college, at the time he was arrested he was registered to return to Rockland Community College.

Just from my own personal conversations with him, he is basically a very intelligent person and somebody, you know, has within him the ability to complete college.

Dr. Wilke saw Mr. Wilson at a point in his life where he could either fall into a permanent pattern of criminal behavior and be lost to society, be a menace to society and himself or also might be helped in resolving these problems stemming from his family background by a period of intensive probation and I know that the Southern District of New York—

THE COURT: I don't know he said that. He may have implied it, but I don't know that he said that. Let me intervene—

MRS. HERMANN: Southern District has probably one of the finest departments of probation in the nation. If Mr. Wilson was placed on probation with a sympathetic probation officer and with my help in finding a psychiatrist through Dr. Wilke or through other resources available in the New York area so Mr. Wilson could go into a course of psycho- [102] therapy, I think there is a substantial chance that Mr. Wilson really could be saved.

I have observed a definite change in Mr. Wilson from the time that I first represented him as he has been in

West Street. Then again we are getting into my personal opinion.

Incarceration has had a very negative impact on Mr. Wilson, I fear very greatly, your Honor, that if you send Mr. Wilson away to prison on that you will be writing off one human being for the rest of his life and for the rest of society's life and I feel that this matter of sentence comes before the Court at one of the worse possible contentions.

I cannot believe that the Court is not negatively influenced by the fact that Mr. Wilson has what Dr. Wilke described as an adolescent loyalty to Mr. Anderson—

THE COURT: Why should I be adversely affected by that. I understand perfectly well why he is doing what he is doing.

I am not angry at Mr. Wilson because he refuses to testify. That is up to him.

MRS. HERMANN: I am afraid the Court may take that as a sign of lack of repentence and rehabilitative potential.

THE COURT: I am not sure that wouldn't be fair appraisal, too, but that doesn't mean I am angry or put off [103] by that. I want to cut this short, ladies and gentlemen, I myself have been responsible for its going on this long.

Let me say this: What impresses me above all about what Mrs. Hermann has said is that I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson.

I therefore decline to sentence him at this time.

Under those circumstances I do not believe that he can be required to testify.

I will hear counsel as to whether he believes that the witness can be required to testify before sentence, but I do not think that he can.

MR. FEINBERG: Your Honor, I have two things to say. Just as to your ruling as to the sentence, might your Honor not reconsider the other alternative that he made and since—I have no reason to doubt Mrs. Hermann—sentence the defendant just as Mr. Bryan was

sentenced and get a thorough examination of this defendant.

THE COURT: I don't see any reason why I should just arbitrarily impose that sentence in order to accommodate the Government here particularly where, although I do not believe Mr. Wilson's testimony would be cululative as distinct from the other case that you are pressing, you have two very solid identification witnesses.

[104] MR. FEINBERG: The Government would contend that it is absolutely irregular to the question of testimonial immunity whether or not a particular individual has been sentenced or not before the immunity is granted.

In the very recent case three weeks ago in this Circuit, the matter of Goldberg, Chief Judge Friendly, speaking for a unanimous court, one concurring opinion, excuse me, stated that in a situation where a defendant who had not even been convicted of the crime charged had been granted use immunity, he had to testify.

THE COURT: May I see it?

MR. FEINBERG: I don't have it. I have it, your Honor.

(Pause.)

THE COURT: Are you acquainted with this case?

MRS. HERMANN: Yes, your Honor, and I would be prepared to distingiush it if the Court wanted to hear me.

THE COURT: Tell me now and I will read it having that in mind.

MRS. HERMANN: In Goldberg you had a man who had been—had a complaint filed against him and no further action or proceedings and the criminal charges against him and he was called to testify before the Grand Jury and immunity, use immunity, was given under 18 USC 6002.

[105] He refused to testify on the grounds that with the pending criminal proceeding these things could be used against him.

THE COURT: Isn't that a weaker case than yours?

MRS. HERMANN: I think there the implication of the Court of Appeals was clear that they did not feel that this case, that the criminal case on which the complaint had been filed was in fact going to go forward.

THE COURT: It doesn't have to go forward, if it could go forward.

MRS. HERMANN: Also the threat there was an ephemeral they had. There had been no prosecution, no conviction and therefore no sentence as opposed to this case here where you have a direct and immediate prejudice.

THE COURT: To what?

MR. HERMANN: This gets back into my argument about the prejudice on sentence.

THE COURT: You think I am going to be tougher?

MRS. HERMANN: Yes.

THE COURT: From what I have learned. I have already heard what Mr. Linden had to say.

Let me read this.

(Pause.)

THE COURT: I must say that I am rather persuaded [106] by the Government's position on this case. It seems to give a very broad reading to the statute and even Oaks, who concurs with regret, in the broad reading says with reluctance I feel bound by Kastagar to concur in the majority opinion, neither in legislative history nor practical effect is there any legitimate distinction between a person who has not yet been arrested and one who already has been.

This seems to me to suggest that there is not a distinction although it is not exactly the same, it is certainly analogus, between somebody who has pleaded guilty or who is at a later stage of the process or somebody who has been sentenced and somebody who has not been sentenced.

MR. FEINBERG: Just two very quick points on this. One is as the majority points out, the same thing your Honor pointed out yesterday, we take the risk, if anything is stated by this witness of having to find

an independent source in order to go further on the matter that he testifies about.

The second point just in reply to Mrs. Hermann, this idea that your Honor might be affected by something—by the proceedings, an analogus situation is the Court, the sentencing judge has a variety of matters that might be not properly before the Court.

THE COURT: I have already stated that I am not impressed by that matter.

[107] So we are back where we started except for the fact that I will not proceed with the sentencing of Mr. Wilson. I do ask Mr. Wilson to resume the stand.

MRS. HERMANN: May I just respectfully except. I don't think that Goldman compells that and to the extent that the Court feels Goldberg does, I think Goldberg misread Kastagar and on appeal or certiorari I cannot believe that the holding in Goldberg is going to remain good law.

THE COURT: You may be right. Thre judges of the Court of Appeals may be wrong, but there is a fairly good chance they may be right, too.

Mr. Wilson, will you please take the stand again.

(Mr. Wilson resumes.)

THE COURT: Mr. Linden, I am sorry to have taken your time. We will proceed with the normal pre sentence report in this case.

Would you bear in mind, Mr. Linden, Dr. Wilke's report.

MR. LINDEN: I do not have a copy.

THE COURT: Let me give you a copy. Would you get in touch with Dr. Wilke to the extent you feel it is necessary?

MR. LINDEN: Thank you.

THE COURT: Now, let's try and close this all up.

Mr. Wilson, may I have your attention.

[108] Mr. Wilson, the Government has produced for me its authority to request me to confer on you immunity from prosecution in lieu of asserting your rights under the Fifth Amendment and I do not confer on you immunity against prosecution for anything you may say

while a witness on this stand, except if you lie under oath.

Do you understand what I am saying to you? That means that with regard to any answers which you give to any questions put by Mr. Feinberg while you are on the stand, you may not be prosecuted or anything growing out of that testimony except if you tell—make a false statement under oath.

Mr. Feinberg, you may proceed.

BY MR. FEINBERG:

Q Mr. Wilson, do you know the defendant Robert Joel Anderson?

A I refuse to answer on the grounds that it might incriminate me.

THE COURT: Mr. Wilson, you have no right to refuse to answer on the grounds that it may incriminate you because I have just told you I have conferred immunity on you which means you cannot be incriminated by answering unless you give a false answer.

You can nevertheless refuse to answer if you wish, but if you do, I would have to hold you in contempt of Court [109] and you would be subject to a penalty of imprisonment or of a fine.

Do you understand that?

All right, do you wish to answer the question under those circumstances?

THE WITNESS: I refuse to answer.

THE COURT: I take it you would refuse to answer any question put by Mr. Feinberg with regard to this situation?

THE WITNESS: Exactly.

THE COURT: All right. I don't know that I can take a lot of time for a long sentencing speech.

Any sentence which I impose at the present time with regard to contempt will be a provisional sentence depending upon what the ultimate determination of the legalities of this situation are and any further reports that I get about Mr. Wilson. Is there anything you wanted to add, Mrs. Hermann to what has been said

with regard to what sentence should be imposed on Mr. Wilson with regard to contempt?

Let me first say Mr. Wilson, would you stand, please.

Would you look at me?

THE WITNESS: Excuse me.

THE COURT: Would you give me your attention.

Look at me. Mr. Wilson, I have to hold you in [110] contempt and I do hold you in contempt of Court for your refusal to answer the questions put to you after you were advised that you had no right to refrain from doing so.

Under the circumstances, I am about to impose sentence and I am asking Mrs. Hermann if she wishes to make any statement in that regard.

MRS. HERMANN: Your Honor, I would rest on legal argument I have made.

THE COURT: I am talking now only about sentence.

MRS. HERMANN: And what I said when I thought you were going to impose sentence before. I would like to say one other thing.

That is given the motivation for what Mr. Wilson has done, I would beg the Court to have mercy in this case and to be as lenient as possible in disposing of this case—

THE COURT: To save a friend.

MRS. HERMANN: Yes.

THE COURT: I think that is better than trying to knife a friend, but I don't think that is something any branch of the Government can forgive.

MRS. HERMANN: I ask your Honor to realize that Mr. Wilson did not intend disrespect to the Court. I now that that is not necessarily an element of contempt, but under all the facts and circumstances of the case of Mr. Wilson, [111] of his background, I beg the Court to be lenient and merciful.

THE COURT: I am going to impose the maximum sentence that I think is appropriate at this time, but I am doing it as I mentioned with regard to Mr. Bryan this morning with full realization that there will be an appeal from my ruling.

I will stay the execution of the sentence until the appeal is determined and I will consider a reduction of

the sentence should the appeal affirm my ruling so that I don't think anybody needs to be worried about the situation at the moment.

What I am doing is to preserve the authority of the Court what it ultimately determines to be best.

Accordingly, Mr. Wilson, I ask you if you have anything you wish to say with regard to what sentence should be imposed on you for your failure to answer the questions which I ordered you to answer?

THE WITNESS: Nothing to say.

THE COURT: All right. I hereby sentence you to the custody of the attorney general or his authorized representative for a period of six months because of your contempt of this Court and your violation of my order and I stay the execution, that means, postpone your having to do that time, until a determination from an appeal of my sentence. You [112] have the right to appeal my sentence and you have a right to appeal my holding you in contempt of court.

Do you understand that?

THE WITNESS: Yes, I do.

THE COURT: If you don't have the funds to file an appeal, I will instruct the Clerk of this Court to file an appeal for you.

Do you have the funds to file an appeal on your own?

THE WITNESS: One thing: Does this mean I remain incarcerated?

THE COURT: You remain just like you were.

MRS. HERMANN: I know what question you are thinking of and I will ask about that.

Do you have money?

THE WITNESS: No, I don't.

THE COURT: Mr. Clerk, will you please file a notice of appeal for Mr. Wilson from my ruling and my conviction and sentence?

THE CLERK: Yes.

MRS. HERMANN: Your Honor, I have two questions. Is the Court reserving decision on whether the six months will be a concurring or consecutive sentence, to any sentence that might be imposed?

[113] THE COURT: I don't know whether I can reserve decision so I will say no, it would be consecutive to any sentence that I would impose for which the defendant has pleaded guilty. Otherwise there would be no point to it. That doesn't mean ultimately the sentence may be more than a week, but whatever it is it will be consecutive.

MRS. HERMANN: I would request that the defendant be allowed bail pending appeal of this case because I believe that there is a substantial issue in this case and I request that the bail conditions currently existing in the bank robbery case be held to apply to the appeal of this case as well and that no additional bail conditions be imposed.

THE COURT: I would impose no further bail. I don't know how that helps, but I would impose no further bail.

Are you asking for further bail?

MR. FEINBERG: No, your Honor, we have no objection to that.

THE COURT: All right.

MRS. HERMANN: Thank you, your Honor.

THE WITNESS: Thank you.

(Witness excused.)

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EXCERPTS OF TRANSCRIPT OF MARCH 30, 1973 [3]

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[THE COURT:] Now, I have received today from Mr. Bryan or rather from Mr. Brown, Robert P. Brown, who states that he is the attorney for Mr. Bryan and I have no reason to doubt it, an affidavit outlining his meetings with Mr. Bryan in which he has advised Mr. Bryan with regard to Mr. Bryan's expressed desire not to testify in this case.

I will make the affidavit an exhibit. It states at the end: "I respectfully urge that unless the Government grants Bryan full immunity from the entire crime and all related aspects, which I don't quite understand, any

attempt to compel testimony before his sentencing, which Mr. Bryan contends has not yet occurred because of the fact that Judge Cooper has sentence under Section 4208 C, which leaves open the possibility of a reduction of sentence, would, as Mr. Brown puts it, be violative of Mr. Bryan's constitutional [4] rights, including what Mr. Brown characterizes as 'the right to withdraw his plea of guilty or to appeal from his sentence.' "

I already expressed my view yesterday that the Federal law does not permit Mr. Bryan to withdraw his plea of guilty, does not permit him a right, it permits him always a right to apply to vacate his plea of guilty and certainly does not permit him to appeal his sentence which I understand was imposed after a plea of guilty for which there is no—well, there is no right to appeal a sentence in any event, under Federal law and certainly with regard to a case in which it was imposed after a plea of guilty.

I think we should proceed by calling in Mr. Bryan, by my granting him immunity, by your asking him such questions as you wish and seeing whether he refuses to answer those questions, and if so, my doing whatever is necessary under the circumstances.

The only further question I would like to explore, subject to giving Mrs. Hermann the right to say anything she wishes in behalf of Mr. Bryan, since she is present and he doesn't have counsel physically present, is to ask Mr. Feinberg whether he has satisfied himself of the validity of the immunization authorization which has been put into evidence as Court Exhibit 1.

[5] MR. FEINBERG: Your Honor, I have discussed this matter with our office and also researched the problem and our office will make the statement on the record at this time, that this is absolutely proper.

The teletype communication that we received from Washington was signed by Henry E. Petersen, the Assistant Attorney General of the Criminal Division, and there are cases, specifically United States versus Dimauro, 551F 2nd 428, Eighth Circuit, 1971, which hold that under the old Immunity Statute, but as far as the authorization by Mr. Petersen that that is perfectly proper.

THE COURT: It is proper when it is by the Assistant Attorney General?

MR. FEINBERG: Absolutely.

THE COURT: My understanding had been, and I don't know that it has been changed, that the Attorney General had to specifically authorize it. Am I thinking of wiretaps?

MR. FEINBERG: Your Honor, as to wiretaps, I did bring up United States versus Puntillo in this circuit where that problem was precisely the issue raised and the Court dealt with that there.

THE COURT: I am satisfied to proceed on your representation that you are because you are the loser if you are wrong.

[6] MR. FEINBERG: Thank you.

THE COURT: Mrs. Hermann, do you want to add anything to this ragu?

MRS. HERMANN: Yes, your Honor.

I would first like to suggest that if we reach the point, which I fear we will, where we actually call Mr. Bryan to the stand, that this might be done out of the presence of the jury.

THE COURT: It will be.

MRS. HERMANN: My basic position on behalf of Mr. Bryan and I have spoken to him this morning to ascertain whether there might be a conflict on my speaking in his behalf on this matter.

I have ascertained that there is no conflict between him and Mr. Wilson in this matter.

THE COURT: He wasn't involved in the same case as far as I know.

MRS. HERMANN: —is we shouldn't even reach the issue of whether the grant of immunity is proper or whether his failure to answer under these circumstances would be contempt because a sentence has been imposed under 4208, 4208C mandates a maximum provisional sentence be imposed in order to send a person away for a 90 day study.

It is very rare that a person, in fact, [7] receives the maximum after that 90 day study and I understand that the affidavit from Mr. Brown, Mr. Bryan's attorney,

states that Judge Cooper indicated on the record that it was a technicality mandated by the statute that he impose the maximum in order to send Mr. Bryan away for this 90 day study and under no circumstances did he intend to impose the maximum in this case.

THE COURT: I am prepared to believe that. That is normal procedure. I agree with you.

MRS. HERMANN: It would be my position and I have found no cases directly that support this position that where a person has been convicted, but is before sentence and where he has been convicted on his plea and I think it is recognized that one of the reasons that a defendant will enter a plea of guilty is to keep the details of the crime from influencing the Court at the time of sentence.

Q That may be recognized as a reality, but I don't know that it is recognized as a basis for sustaining a constitutional right to remain silent if called upon.

MRS. HERMANN: My position would be, your Honor, that there is no way the grant of immunity could protect Mr. Bryan from the potential prejudice and impact that his statements under oath should he testify might have upon his sentence before Judge Cooper.

[8] THE COURT: I agree with you. There is no way in which that can be done. There are two counterarguments. One is that Judge Cooper could be equally prejudiced by his refusal to testify.

MRS. HERMANN: That is the other half of my argument.

THE COURT: And secondly he is not entitled to be protected against those risks.

MRS. HERMANN: There are certain facts and perhaps Mr. Bryan should be here when I advance this part of the argument.

THE COURT: I have no objection. Call in Mr. Bryan now.

(Robert Bryan enters the courtroom.)

THE COURT: Will you be seated, Mr. Bryan. I want to tell Mr. Bryan, Mr. Bryan I have had an affidavit from your regular lawyer, Mr. Brown, who has

told me that he talked this situation over with you and he has told me that you don't want to testify and he has told me what his position is on the law.

I asked Mrs. Hermann to come here because Mr. Brown couldn't be here personally.

She is now telling me what she believes to be the law.

MRS. HERMANN: What my argument would be, your Honor, [9] that it is basic and fundamental violation of due process to put a defendant before sentence in the position where Mr. Bryan has been put. If he does not testify and whether or not he is held in contempt, whether or not he is sentenced on that contempt, that indeed is going to put him in a very bad light at sentencing before Judge Cooper.

If he does testify, it could well be that statements he makes in his testimony will put him in an equally bad light before Judge Cooper.

I believe that the facts and circumstances surrounding the Government's use of pressure to try to coerce Mr. Bryan into testifying at this trial and Mr. Bryan has given me some written statements about two approaches that Mr. Feinberg made to Mr. Bryan's mother, indicating—

THE COURT: You consider that improper?

MRS. HERMANN: I consider it improper given the statements that I am told by Mr. Bryan that Mr. Feinberg made to Mr. Bryan's mother concerning the sentence that would be imposed on Mr. Bryan, if he did testify and if he did not testify.

THE COURT: That is something else again, if those statements were made.

MRS. HERMANN: May I read into the record Mr. Bryan's factual contention is on this.

THE COURT: No, I don't see any point to it. If he [10] wants to make them under oath, that is another matter, but otherwise they are pure hearsay, it seems to me.

MR. FEINBERG: Your Honor, may I just make one comment on this matter because Mr. Kahn raised this question of my discussion with Mrs. Bryan also.

The only discussion that I did have with Mrs. Bryan at her insistence, she called my office, was to tell Mrs. Bryan that in the event Mr. Bryan did testify under the grant of immunity, this cooperation would be made known to Judge Cooper and might very well have an effect on Judge Cooper's ultimate sentence of Mr. Bryan.

MRS. HERMANN: Perhaps, your Honor, a hearing is called for on these allegations by the defendant because I think that it is very relevant to the question of whether he can be compelled to testify in this case.

THE COURT: Why? Supposing Mr. Feinberg had said that Mr. Feinberg if he said something, improper, may be disciplined by this Court or the Court of Appeals or his superiors, that doesn't seem to me to have anything to do with the question of whether Mr. Bryan should or should not testify.

I will tell Mr.—I won't tell Mr. Bryan anything. The thing has gone on long enough. It has been discussed to a fair thee well and I am not blaming you because I invited you here by three or four counsel now. There is no certain guide [11] for any of us as to what the law is. It is my responsibility to follow my own best judgment as to what I believe the law ought to be or is in these circumstances.

The worse that will happen if I am wrong is that the Court of Appeals will reverse me and the worse that could happen if I am wrong, it seems to me, for your client is that his plea of guilty would be vacated as some other court's I know have held in some circumstances, which I don't consider to be exactly the same as this, but have some relationship.

I believe that the position taken—that you have taken, Mr. Kahn has taken and Mr. Brown has taken is not correct because it is ultimately falsely assumes or is based on the assumption that Mr. Bryan or somebody in his position is entitled to protection from Judge Cooper's knowing the facts of his case or knowing that he refused to give the facts of his case.

I do not regard the function of a plea of guilty as granting an immunity bath to a defendant against Judges' knowledge of all other facts that he happens to

make available to the Judge at the time of pleading guilty.

A pre sentence report, for example, would be an absurdity if the defendant had an absolute right to keep the Judge from knowing whatever the Judge can find out by any legitimate means.

[12] Therefore, since that is the basis of the argument and I think it is probably the best argument that can be made I decline to follow that theory.

I am going to hold, because I believe it to be the law, that if questions are put to Mr. Bryan, he must answer them.

MRS. HERMANN: May I direct the Court's attention to just one case, your Honor.

THE COURT: Haven't you already?

MRS. HERMANN: I gave that question to the law clerk.

THE COURT: You want to state it for the record?

MRS. HERMANN: Yes, the case of Miles Versus United States at 281 of 2nd 736, Fourth Circuit decision in 1960 where the Court of Appeals held that the Court, the District Court properly refused to compel the answer from a witness because the Court felt that the incriminating statements which might be made by that witness would influence the Court at the time of sentence.

THE COURT: That is one theory and I simply disagree with it. It seems to me that the sentencing Court is entitled to all the information it can get as long as it doesn't get it by duress or illegal means. I don't consider the granting of a defendant immunity duress or illegal means. He is not going to be asked to admit any crimes so far as I know and I should suppose by and large the questions would be directed to [13] the conduct of the defendant in his case rather than Mr. Bryan's own conduct. Obviously he will have to indicate that he was present in certain situations, but I understand the theory that is advanced in that case. I am not sure whether that was a case in which there had been a conviction by trial or a conviction by a plea of guilty, but I don't know that it is terribly relevant on this particular argument.

In any event, in a case like this where the defendant has pleaded guilty and where the sole or nearly the sole argument is that it may be adverse to the sentence imposed on him, if he is required to answer questions because the sentencing Judge may find out something he wouldn't know otherwise, I disagree with that.

If I am wrong the Court of Appeals will correct my error.

MR. FEINBERG: Your Honor, I ask that the defendant take the oath.

THE COURT: He already has been sworn.

Let the record indicate that Mrs. Hermann is personally conferring with Mr. Bryan at the present time.

(Robert Bryan resumes.)

THE COURT: You can remain present to advise the witness how to answer questions if you wish.

MR. FEINBERG: Should the defendant be reminded he [14] is under oath?

THE COURT: Mr. Bryan, I remind you that yesterday you were sworn to tell the truth in this case and you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: All right, Mr. Feinberg.

DIRECT EXAMINE

BY MR. FEINBERG:

Q Do you know the defendant Robert Anderson?

MR. FEINBERG: The immunity doesn't even attach yet.

THE COURT: Mr. Bryan, you must either answer that question or state that you refuse to answer the question.

A I refuse to answer the question.

THE COURT: On what grounds?

THE WITNESS: On the grounds that it may tend to incriminate me.

MR. FEINBERG: Can I ask him one more question.

THE COURT: Yes.

Q Mr. Bryan, on October 10, 1972, did you along with the defendant Robert Anderson commit a bank robbery in the Nanuet National Bank, Mount Ivy, New York?

A I refuse to answer the question on the ground they might tend to incriminate me.

MR. FEINBERG: I would ask the Court to instruct the [15] witness that he has to answer the question posed.

THE COURT: Mr. Bryan, I do instruct you that you must answer those questions. As I understand it you have pleaded guilty to that very bank robbery and therefore I fail to understand how you are admitting that you did commit the bank robbery at this time can incriminate you?

THE WITNESS: Your Honor—

THE COURT: Say what you wish.

THE WITNESS: I have pleaded to an assault with a weapon. I have not pleaded to a bank robbery.

THE COURT: Is that so?

THE DEFENDANT: That is so.

THE COURT: If that is so I would agree with you.

MRS. HERMANN: I have no personal knowledge of that.

MR. KAHN: That is so. I refer your Honor to the affidavit of Mr. Brown.

THE COURT: You are correct, Mr. Bryan, and I sustain your refusal to answer the last question. At least let me state that Judge Cooper's sentence indicates, filed March 20, that Mr. Bryan pleaded guilty to knowingly and wilfully and unlawfully assaulting persons and putting in jeopardy the lives of persons by the use of dangerous weapons and devices, et cetera.

[16] Q Mr. Bryan, on October 10 did you enter the Nanuet National Bank with the defendant Robert Anderson?

MR. KAHN: May I make an objection at this point with your permission?

THE COURT: You can always object to a question.

MR. KAHN: May I as an officer of the Court, call something most respectfully to your attention?

I think once he has uttered his constitutional rights, counsel does not have the right to proceed.

THE COURT: You mean he couldn't ask him his mother's name now. Don't be silly. Sit down, Mr. Kahn.

Q Mr. Bryan, on October 10, 1972, did you enter the Nanuet National Bank with Mr. Anderson?

A I refuse to answer the questions on the grounds that they might tend to incriminate me.

MR. FEINBERG: Your Honor, I would ask that the Court hold Mr. Bryan in contempt and that he be immediately sentenced under 18 US Code 401.

THE COURT: I decline to do so, Mr. Feinberg. The Government has not immunized Mr. Bryan at this time and some of these questions may overlap into crimes other than the one to which he pleaded guilty.

MR. FEINBERG: If any of these questions overlap, Mr. Bryan is receiving full immunity as to anything he might [17] answer here in this courtroom.

THE COURT: What did he receive immunity?

MR. FEINBERG: I have asked that the Court instruct Mr. Bryan that anything he receives under this notification from Washington—

THE COURT: That hasn't come up yet in the proceedings this morning that I know of. You have only told me that I am authorized to grant immunity and you haven't requested me to do so yet.

MR. FEINBERG: I am sorry, your Honor.

THE COURT: He is only pleading the Fifth Amendment.

MR. FEINBERG: At this time I would ask the Court to instruct Mr. Bryan as to that.

THE COURT: I will instruct him.

Mr. Bryan.

THE WITNESS: Yes, sir.

THE COURT: There is a possibility that you are entitled to refuse to answer these questions under the Fifth Amendment as you just indicated because they might tend to incriminate you.

The Assistant Attorney General has authorized the United States Attorney's Office and me to grant you immunity from prosecution—pursuant to 18 United States Code, Section 6003 in this case, and any further proceedings resulting from [18] this case or ancilliary to this case.

I therefore am advising you that I am hereby conferring on you immunity from prosecution, as I indicated.

Which means that your refusal to answer on a claim that your answer would tend to incriminate you is no longer valid, but you will not be prosecuted for anything that you answer here in Court unless you lie under oath.

Now, under those circumstances I will ask Mr. Feinberg to put his questions to you again and I instruct you in advance that if they are the same questions, I will then order that you must answer those questions because you cannot be prosecuted for anything growing out of your answers and if you refuse to answer then, I would be forced to hold you in contempt of Court, which means to impose either a jail sentence or a fine.

Do you understand what I have said?

A Yes, your Honor.

THE COURT: All right.

BY MR. FEINBERG:

Q Mr. Bryan, do you know the defendant Robert Joel Anderson?

A I refuse to answer the question on the ground that it might tend to incriminate me.

THE COURT: Mr. Bryan, I am directing you to answer [19] that question because it can no longer tend to incriminate you since I have conferred upon you immunity from prosecution.

THE WITNESS: Your Honor, the question in point, I did not ask for this immunity.

THE COURT: You did not ask what?

THE WITNESS: I was not asked for this immunity.

THE COURT: I know, Mr. Bryan, but it isn't necessary for you to ask. The Government has the right to ask me to confer it on you whether you want it or not. I am telling you as the person responsible to tell you what the law is and even Mrs. Hermann will agree with me on this one that you have no right to refuse immunity.

Therefore, I am instructing you that you must answer the question or I will hold you in contempt of Court.

Do you continue to refuse to answer the question?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Mr. Bryan, I shall proceed upon due reflection to impose a penalty upon you for your failure to obey the instructions of the Court. At the moment, I am merely ruling that you are in contempt of Court.

I will impose sentence shortly. I ask you to return to the witness room. I would like to confer with counsel where we go from here.

[20] THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Mr. Feinberg, are you going to attempt to proceed further in this case—let me ask you this.

My suggestion is that I impose a sentence of a specific period of time, a lawful period of time subject to the elimination of that sentence or reduction of it to nothing should Mr. Bryan care to testify and answer the questions which you have put.

It may become academic in a case like this because I assume you have to move in along in this case.

MR. FEINBERG: At the conclusion of this matter with Mr. Bryan, we go on to the other bank robbery.

MRS. HERMANN: Will the Court hear from counsel on the subject of sentence.

THE COURT: Sure, mustn't I?

MRS. HERMANN: I am not sure in a contempt case, your Honor.

THE COURT: It is a good practice.

(Robert Bryan enters the courtroom.)

MRS. HERMANN: Your Honor, on the question of sentence which may be imposed or will be imposed by this Court on contempt under 18 U.S.C. 401, the sentence of contempt does not only—can be for a period up to six months unless there is [21] to be a trial by

jury. It can be a fine. It can also be probation, your Honor.

Iwould respectfully urge the Court that Mr. Bryan—the only words that come to my mind means no contempt in a non-legal sense.

THE COURT: I don't consider him to have a chip on his shoulder towards the Court or towards me.

MRS. HERMANN: I find the whole conduct of the Government towards this witness troublesome and I would ask the Court to take that into consideration:

That there is no question but that Mr. Bryan has been really whip-sawed here with no very good alternatives open to him at all. I think that he—

THE COURT: That is an assumption there should be alternatives open in a situation of this kind.

MRS. HERMANN: I would urge the Court particular in view of the fact that a 90 day study has been imposed so that Judge Cooper may make a rational and humane decision about the ultimate sentence in this case to impose a term of no more that 90 days for the contempt and to run it concurrent with the time during which the 90 study will be conducted.

THE COURT: I wouldn't do that. I will tell you what I am going to do: I am going to impose the maximum sentence here, very much like Judge Cooper did, with the deliberate [22] intention of revising that sentence to what might be appropriate in the light of the very study that is going to be made. After all, we are talking to some extent in academics at the moment.

Mr. Brown, is in custody. He is going to be in custody for a while and I want to preserve the Court's power to do what seems sensible in the light of the study.

Therefore—

MR. FEINBERG: Your Honor, may I say one thing. Your Honor, I am not asking that Mr. Bryan be sentenced to a six month maximum under 18402. I am asking that Mr. Bryan be sentenced at your discretion under 18-401 which provides no maximum sentence whatsoever.

THE COURT: I am reluctant to impose a sentence of more than six months when I am acting on my own.

MR. FEINBERG: For your consideration, might your Honor consider imposing a sentence consecutive to whatever Judge Cooper ultimately sentences the defendant to?

THE COURT: I would because if I am going to impose any sentence that has any reality, I want it to be consecutive with Judge Cooper's sentence and not concurrent.

Mr. Bryan, you have a right to say anything you wish at this time as to what sentence I should impose on you with regard to your contempt of Court. Is there anything you wish [23] to tell me?

THE DEFENDANT: Really no, your Honor.

THE COURT: Mr. Bryan, will you please stand.

I have heretofore held you in contempt of Court for violation of the statutes to which we have referred this morning and I impose on you at this time a sentence of six months, you are to be committed to the custody of the Attorney General or his authorized representative for a period of six months to commence subsequent to whatever term shall be served under the sentence of any amendment of sentence with regard to your plea of guilty in 72 Cr. 1190, the case in which you pleaded guilty before Judge Cooper.

That is the sentence.

I wish to add that after this study is concluded or should you appeal my holding you in contempt and my sentence and I think it would be proper for you to appeal it, so that the question raised here can be settled, I will, of course, consider any application for reduction of sentence.

MRS. HERMANN: Just to clarify that. Your Honor is not sentencing under 4208 C then?

THE COURT: No, I am not. I am imposing an absolute sentence but I retain jurisdiction to reduce the sentence to nothing or up to four months from now or if there is an appeal from up to four months after the final disposition of any appeal.

[23a] I will stay execution of the sentence in the meantime.

MRS. HERMANN: Thank you, your Honor.

MR. FEINBERG: Thank you, your Honor.

(Robert Bryan left the courtroom.)

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SUPREME COURT OF THE UNITED STATES

No. 73-1162

UNITED STATES, PETITIONER,

v.

THOMAS JOSEPH WILSON and BOBBY ANTONIO BRYAN

ORDER ALLOWING CERTIORARI—Filed May 13, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 551013 285

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner,

-v.-

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

APPLICATION ON BEHALF OF
THOMAS JOSEPH WILSON
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Respondent Thomas Joseph Wilson respectfully seeks leave to proceed here in forma pauperis. Counsel's affidavit in support of this application is annexed.

Respectfully submitted,

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New York, New York
March 7, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner,

-v.-

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SHEILA GINSBERG, being duly sworn, deposes and says:

I am an attorney associated with William E. Hellerstein and Phylis Skloot Bamberger, The Legal Aid Society, Federal Defender Services Unit. I make this affidavit in support of respondent Thomas Joseph Wilson's application for leave to proceed here in forma pauperis.

At his trial, respondent Wilson was represented by The Legal Aid Society, Federal Defender Services Unit, assigned by the United States District Court for the Southern District of New York pursuant to the Criminal Justice Act.

The United States Court of Appeals for the Second Circuit continued the assignment on his appeal to that Court.

Mr. Wilson is currently incarcerated serving the sentence imposed by the District Court for bank robbery.

On information and belief, Mr. Wilson's financial status has not changed since the original assignment of counsel.

WHEREFORE, it is respectfully prayed that respondent Thomas Joseph Wilson be permitted to proceed here in forma pauperis.

Sheila Ginsberg
SHEILA GINSBERG

Sworn to before me this
7 day of March 1974

Phylis Skloot Bamberger
Notary Public

PHYLIS SKLOOT BAMBERGER
Notary Public, State of New York
No. 31-
Qualified in New York County
Commission Expires March 30, 1975

MAR 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

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No. 73-1162

UNITED STATES OF AMERICA,

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-v.-

THOMAS JOSEPH WILSON and
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Respondents.

BRIEF FOR THOMAS JOSEPH WILSON IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SHEILA GINSBERG,
Of Counsel

IN THE

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OCTOBER TERM, 1973

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UNITED STATES OF AMERICA,

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THOMAS JOSEPH WILSON and
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IN OPPOSITION TO
THE GOVERNMENT'S
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the District Court and included as Appendix A to the petitioner's appendix, is now officially reported at 488 F.2d 1231.

STATEMENT OF THE CASE

Respondent Thomas Joseph Wilson adopts the statement in the petition for writ of certiorari, with the following additions and corrections:

After respondent had pleaded guilty to bank robbery before The Honorable Morris E. Lasker, but before he was sentenced, he was called by the Government to testify in the trial (also before Judge Lasker) of his co-defendant, Robert Anderson.

When, out of the presence of the jury,* respondent refused in an orderly and respectful manner to testify, asserting his Fifth Amendment privilege against self-incrimination, defense counsel moved for a brief continuance to allow her to research adequately the legal issues of survival of the privilege after the plea of guilty and the sufficiency of a grant of immunity to protect respondent from prejudice to the future sentence to be imposed pursuant to his plea of guilty to the bank robbery** (88***). The trial judge denied the motion.

Instead, in an effort to obviate respondent's need to assert the privilege, the trial judge decided to accelerate the sentencing procedure, review the pre-sentence report, and impose sentence for the bank robbery immediately. However, after hearing the probation officer (93-96) and defense counsel on the matter of respondent's history, including his psychiatric problems, the trial judge declined to impose sentence, concluding:

---

*The jury had been excused before respondent was called to the witness stand, and thus the orderly refusal to testify and the proceeding in which respondent was summarily found to be in contempt were conducted out of the jury's presence.

**The Court of Appeals rejected petitioner's assertion made again in this Court (petition at 7, fn.3) that defense counsel had failed to object to the summary procedure, and held sufficient the explicit request for a continuance to allow for research and the presentation of a defense.

***Numerals in parentheses are references to pages of the transcript of the trial of Robert Joel Anderson. The entire portion of the transcript which concern's respondent's refusal to testify has been lodged by petitioner with the Clerk of the Court.

> ... I do not believe that in this complicated case I have sufficient information before me justly to proceed to sentence with Mr. Wilson.
>
> (103).

There followed in rapid succession a grant of immunity, respondent's reaffirmance of the privilage and his refusal to testify, a summary finding of contempt, and imposition of a six-month term of imprisonment to be served consecutively to whatever sentence respondent would, in the future, receive on the pending bank robbery conviction.

REASONS FOR DENYING THE WRIT

The petitioner, in essence, proffers three arguments as to why the writ of certiorari should be granted to review the decision of the Court of Appeals. None, however, supports the request.

I

Petitioner first claims that Harris v. United States, 382 U.S. 162 (1965), which precludes a summary finding of contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure for an orderly refusal to testify before the grand jury, does not apply to a situation where the refusal to testify occurred in open court.

The explicit language of Harris precludes petitioner's interpretation. Harris explains that summary disposition as provided for in Rule 42(a) is available only in "exceptional circumstances" where, for example, the judge must act instantaneously to quell a disturbance or halt obstreporous conduct in order to restore the dignity and authority of the court. Harris v. United States, supra, 382 U.S. at 164. See also Cooke v. United States, 267 U.S. 517 (1925); Ex Parte Terry,

128 U.S. 289 (1888). The rationale for this limitation on the use of the summary contempt power is the congressional and judicial fear of the abuse of the power. Harris v. United States, supra, 382 U.S. at 164.

Consequently, the perimeters of its exercise are defined by the "least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat 204, 231 (1821). It follows that in a situation where the court's authority is endangered by physical violance or destruction or verbal abuse occurring in open court, the judge must have the power to act immediately to restore order, and he is given that power by Rule 42(a). Cooke v. United States, supra; Ex Parte Terry, supra. In all other situations, the "normal procedure" to be followed is set forth in Rule 42(b) which, in accordance with requirements of due process, provides for notice, a hearing, and an opportunity to prepare and present a defense. Harris v. United States, supra, 382 U.S. at 165. The Court concluded, in Harris, that a witness' orderly refusal to testify before the grand jury, not being an "exceptional circumstance,"* required a hearing pursuant to Rule 42(b).

---

*Petitioner makes an unsuccessful attempt to convert an orderly refusal to testify into an "exceptional circumstance" because it results in a delay in the trial, requiring prompt judicial action in the form of a criminal contempt citation. What petitioner fails to consider is that the trial judge, in order to compel testimony, has within his power the ability to imprison summarily a recalcitrant witness upon a finding of civil contempt. In fact, the trial judge is required to consider first the feasibility of coercing testimony through imposition of civil contempt before imposing criminal contempt. Shillitani v. United States, 384 U.S. 364, 371 fn.9 (1966). Even when, as here, the trial is short, the remedy of civil contempt is effective to obtain the desired testimony. The witness will remain in prison throughout the trial, encouraged to testify by his ability to obtain his own release. At the end of the trial if the witness still has not complied, the court is not, as petitioner would have it, without the remedy of criminal contempt. The court can avail itself of this remedy to punish, and do so in accord with due process requirements.

Notwithstanding this clear demarcation, petitioner would have as controlling the fact that the refusal occurred before the grand jury, and would have Harris and its predecessors (Cooke v. United States, supra; Ex Parte Terry, supra) re-interpreted to mean that the only factor in determining the availability of the summary procedure to a charge of contempt is whether the act occurred in "open court." Judge Taft's opinion in Cooke v. United States, supra, considered and rejected this argument, holding that a summary disposition was permissible only when restoration of the court's authority required it, and that the court's personal knowledge of the events, obviating the need for a hearing, enabled him in otherwise appropriate circumstances to conduct such a proceeding:

> ... Punishment without issue or trial was so contrary to the usual and ordinary indispensible hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.
>
> Id., 267 U.S. at 536.

See also United States v. Willet, 432 F.2d 202 (4th Cir. 1970); United States ex rel. Robson v. Malone, 412 F.2d 848, 850 (7th Cir. 1969).

The holding in Groppi v. Leslie, 404 U.S. 496 (1972),* supports this analysis. In Groppi, the Court found a summary disposition of contempt unavailable to punish even obstreporous conduct committed in the presence of the legislature when the lapse of two days precluded the possibility that the summary finding was necessary to restore the chamber's authority. Id., 403 U.S. at 503-04.

---

*Ironically, this case is cited by the Government for its position that the only determinative factor is the occurrence of the contempt in "open court."

Similarly, the Government's corollary argument, that the judge's having heard the alleged contempt there remains "no purpose" to the hearing, is considered and explicitly rejected in Harris. In Harris, where, as here, there was no dispute over the fact of the witness' refusal to testify, the Court found that notice and a hearing were nonetheless critical to the determination of the issue of contempt:

> What appears to be a brazen refusal to cooperate with a grand jury may indeed be a case of frightened silence. ... Other extenuating circumstances may be present. ... [T]he record ... reveals only the bare bones of demand and refusal. If justice is to be done, a sentencing judge should know all the facts. ... Our point is that a hearing and only a hearing will elucidate all of the facts and assure a fair administration of justice.
>
> Id., 382 U.S. at 166-67.

Denial of a hearing and time to prepare precluded the presentation to the trial court of a legal defense to the charge of contempt, which involved complex questions of whether a Fifth Amendment privilege survives a guilty plea,* and then whether a grant of immunity, in these circumstances, is co-extensive with the privilege. Kastigar v. United States, 406 U.S. 441 (1972).

Moreover, the lack of a hearing on adequate notice severely limited counsel's efforts to develop fully the pertinent facts which existed in mitigation of contempt. For example, the record reveals the strong possibility of a psychiatric defense for respondent's refusal to testify. Groppi v. United States, 404 U.S. at 505. Respondent's psychiatric problems were revealed not on the contempt charge, but rather in the aborted effort to sentence him on the bank robbery charge before he was called as a witness. Ironically, the

*This question still has not been determined. United States v. Wilson, 488 P.2d 1231, 1233 (2d Cir. 1973).

district judge concluded there was not sufficient psychiatric information to sentence respondent on the bank robbery at that time, but then proceeded, five minutes later, and without consideration of respondent's mental problems, to sentence him for contempt. Because of the haste with which respondent was found in contempt, the record is silent, as it was in Harris, on other facts which may exist in mitigation of the charge.

II

Petitioner argues that there is a conflict as to the applicability of Rule 42 and Harris v. United States, supra, which has developed between the Second Circuit and the Sixth and First Circuits, requiring issuance of the writ. However, no conflict exists. Petitioner is mistaken in asserting that United States v. Seaver, 472 F.2d 607 (6th Cir. 1973), and Baker v. Eisenstadt, 456 F.2d 832 (1st Cir. 1972), have interpreted Rule 42(a) and Harris to mean that the only critical element is whether the contempt was committed within the view and hearing of the court. In Seaver, the applicability of Rule 42(a) was neither raised nor questioned, and consequently was not considered by the Court of Appeals. In Baker v. Eisenstadt, a habeas corpus proceeding challenging a state finding of contempt, the Federal Rules of Criminal Procedure do not apply.

III

Finally, petitioner argues, citing Groppi v. Leslie, supra, that if Harris v. United States, supra, controls this case, Harris should be overruled. However, Groppi does not support this contention. The language quoted from Groppi in the petition at 14 is not addressed to the availability of a summary proceeding to an orderly refusal to testify, but

rather to the requirement that to conduct the summary proceeding the court must have observed all the elements of the misconduct. Harris v. United States, supra, was correctly decided: it reaffirms the previous judicial analysis of the court's limited authority to punish summarily for contempt (Cooke v. United States, supra; Ex Parte Terry, supra), and is properly the controlling principle.

CONCLUSION

Since there is no substantial question properly before the Court, and since the decision below is correct, the petition for wirt of certiorari should be denied.

Respectfully submitted,

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MOTION FILED
APR 22 1974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner

v.

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

MOTION OF BOBBY ANTONIO BRYAN TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner

v.

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

MOTION OF BOBBY ANTONIO BRYAN TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO THE GOVERNMENT,S PETITION FOR A WRIT OF CERTIORARI, ETC.

Herbert Ira Handman, on behalf of Bobby Antonio Bryan, one of the Respondents above named, respectfully moves this Court for leave to proceed in forma pauperis and to submit the following Brief in opposition to the Government's Petition for a Writ of Certiorari to review the jusgment of the United States Court of Appeals for the Second Circuit in this case.

I represent to the Court that I have been acting as counsel for the Respondent Bryan pursuant to appointment by the Court under the Justice Act. Mr. Bryan is presently incarcerated and has been for some time. He was without funds to pay for a lawyer at the time I was appointed and his situation has not improved from that time to the present. He is presently not incarcerated here in the City or County of New York, so that I am not able to secure an affidavit of poverty as would normally be done to accompany this Motion. I am sure the Government is aware of Mr. Bryan's indigence and will not oppose his proceeding in forma pauperis.

With respect to the Brief to be submitted I submit the following:

BRIEF

Reference is made to the Brief filed with this Court by William E. Hellerstein, Phylis Skloot Bamberger, as Attorneys for Respondent Thomas Joseph Wilson, The Legal Aid Society, Federal Defender Services Unit, Sheila Ginsberg, of Counsel dated March 6, 1974.

A review of such brief indicates to me that the arguments and citations there presented in support of the decision below substantially are the same which I would submit on behalf of Mr. Bryan. A Brief in behalf of Mr. Bryan would in my opinion therefore be duplicitous of the material in the Brief in Opposition filed for Mr. Wilson

Under these circumstances I respectfully request the Court to permit me to adopt on behalf of my client Bobby Antonio Bryan the said Brief submitted on behalf of Thomas Joseph Wilson above referred to.

CONCLUSION

It is respectfully submitted that there is no substantial question raised by the Government warranting a review of the decision below and in any event the lower court's decision is correct.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

No. 73-1162

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 488 F. 2d 1231.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25) was entered on November 28, 1973. On December 20, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 28, 1974, and the petition was filed on that date. It was granted on May 13, 1974 (App. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *Harris* v. *United States*, 382 U.S. 162 (involving the refusal of a witness to answer questions before a grand jury), precludes the use of summary criminal contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure when a witness, in disobedience of a court order, refuses to testify at a criminal trial after receiving a grant of immunity.

2. Whether, if the principles of *Harris* are found to govern the instant case, that decision should be overruled.

STATUTE AND RULE INVOLVED

18 U.S.C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Pursuant to indictments returned in the United States District Court for the Southern District of New York, respondent Wilson and one Robert Anderson were charged with armed robbery of the federally insured Empire National Bank in Tuxedo, New York. Anderson was also charged with robbery of the Nanuet National Bank in Mount Ivy, New York. A separate indictment charged respondent Bryan with the Nanuet National Bank robbery. Wilson and Bryan both pleaded guilty to charges in connection with the robberies.

Thereafter, Robert Anderson's trial began, and the government called both Wilson and Bryan as witnesses. At that time Bryan had been sentenced provisionally to twenty-five years' imprisonment pursuant to 18 U.S.C. 4208(b). Wilson had not yet been sentenced.[1]

Respondents were sworn as witnesses in the Anderson trial. However, both refused to answer any questions concerning their acquaintance with Anderson or the details of the robberies, predicating their refusals on the privilege against self-incrimination. The reason advanced on behalf of each respondent for claiming the privilege was fear that any testimony would adversely affect final disposition of his own case by informing the sentencing judge of the details of the crimes.[2]

The district court sought to remove this objection as to Wilson by sentencing him immediately. Sentencing was deferred, however, when the court discovered that information in the pre-sentence report had not been verified and that Wilson wished to have the court consider a psychologist's report (App. 6–14).

The court then conferred immunity on respondents pursuant to 18 U.S.C. 6002–6003, ordered them to

[1] Subsequently, Bryan's sentence was reduced to ten years. Wilson was committed for an indefinite term pursuant to the Youth Corrections Act, 18 U.S.C. 5010(b).

[2] The record indicates, and the court of appeals noted, that respondents' motives may have been otherwise. In the case of respondent Wilson, the refusal was plainly based on loyalty to Anderson (App. 14, 19). The privilege against self-incrimination is, of course, entirely personal and may not be invoked to protect another. See *Rogers* v. *United States*, 340 U.S. 367; *United States* v. *Seavers*, 472 F. 2d 607, 611 (C.A. 6).

testify, and warned them that continued refusal would result in punishment for contempt.[3] When respondents persisted in their refusals to testify, both were summarily held in contempt.

Prior to imposing sentence, the court heard from respondents' counsel [4] and in addition offered respondents an opportunity to make a statement concerning the sentence to be imposed. Respondents indicated that they had nothing to say (App. 20, 34) and the court imposed sentences of six months' imprisonment, to be served consecutively to the sentences on the robbery charges. Execution of the sentences was stayed pending appeal.[5]

[3] The court's statement to Wilson, which was substantially identical to the explanation given Bryan, was as follows:

"Mr. Wilson, you have no right to refuse to answer on the grounds that it may incriminate you because I have just told you I have conferred immunity on you which means you cannot be incriminated by answering unless you give a false answer.

"You can nevertheless refuse to answer if you wish, but if you do, I would have to hold you in contempt of Court and you would be subject to a penalty of imprisonment or a fine" (App. 18).

We point out that the word "not" appearing on the second to the last line on App. 11 is a typographical error. The word should read "now."

[4] Since Bryan's counsel was unavailable, he was represented by Wilson's counsel, who had determined that there was no conflict in representing both respondents (App. 22–23). Although respondents' counsel objected to the government's calling of respondents as witnesses, she did not object to the employment of summary contempt procedures.

[5] The sentences were expressly made provisional, with the judge indicating that he would consider a reduction after completion of appellate proceedings on the cases (App. 18–20, 33–34).

554-028—74——2

The court of appeals found that the grants of immunity were dispositive of respondents' privilege claims and that neither respondent followed the "proper procedure in raising the issue of 'forbidden use'" (Pet. App. 21).[6] The court of appeals nevertheless reversed respondents' contempt convictions, holding that the summary procedures of Rule 42(a) are inapplicable to orderly refusals to testify, even when such refusals occur in the course of a trial. Relying on its prior decision in *United States* v. *Marra*, 482 F. 2d 1196, and this Court's decision in *Harris* v. *United States, supra*, 382 U.S. 162, the court of appeals stated that "the bare 'opportunity to be heard'" which was accorded respondents was insufficient because, if permitted a reasonable time, respondents' counsel "might have marshalled and presented facts in mitigation of the charge" (Pet. App. 23). Accordingly, respondents' convictions were reversed and the case was remanded for further proceedings pursuant to the notice and hearing provisions of Rule 42(b).

SUMMARY OF ARGUMENT

The issue presented by this case is whether a witness who refuses to testify, following a grant of immunity coextensive with the privilege against self-incrimination, may be punished for criminal contempt in summary proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure. The court of

[6] The court of appeals outlined what would have been the proper procedure: Wilson could have requested that he be sentenced by a different judge, and Bryan could have sought to have the record of his testimony sealed.

appeals held that such conduct could be punished only upon notice and hearing as provided by Rule 42(b). In so holding, the court of appeals misinterpreted this Court's opinion in *Harris* v. *United States, supra*, 382 U.S. 162, and imposed an unwarranted restriction on the summary contempt power of trial courts that could interfere with the procurement of needed testimony in criminal trials.

In *Harris* this Court held that summary contempt could not be employed to punish a recalcitrant grand jury witness whose refusal to testify was subsequently reenacted before the court. The decision in *Harris* was based on two factors: first, the contumacious conduct was not originally committed in the presence of the court; second, the delay required for notice and hearing under Rule 42(b) would not have significantly affected the operation of the grand jury which sought the testimony.

Although in the present case the contempt was committed in the presence of the court and the delay could have resulted in a substantial disruption of the pending trial, the court of appeals nonetheless relied on *Harris* in holding summary contempt unavailable. The court interpreted *Harris* as limiting the availability of summary contempt to the quelling of disturbances or the punishment of other insolent conduct.

The court of appeals' decision constitutes an unjustified extension of *Harris*. Testimonial refusal in the presence of the court is punishable as criminal contempt under 18 U.S.C. 401(3). The district court properly employed the summary procedures of Rule 42(a), since the contumacious conduct occurred in its

presence after respondents had clear notice that continued refusal would result in contempt. Since the principal purpose of a Rule 42(b) hearing is to establish the facts surrounding the alleged contempt, and since in this case those facts had been directly observed by the district court, there was no reason to resort to the notice and hearing procedures of Rule 42(b). Moreover, utilization of summary civil contempt procedures would have been ineffective, since respondents were already incarcerated, and since the trial in which their testimony was required was to be of short duration.

ARGUMENT

I. REFUSAL TO TESTIFY AT TRIAL IS PUNISHABLE AS CONTEMPT UNDER 18 U.S.C. 401

18 U.S.C. 401 provides, in relevant part, that a federal court shall have power to punish by fine or imprisonment, "such contempt of its authority" as "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Testimonial refusal at trial in disobedience to a court order is clearly punishable as contempt.

The right to summon witnesses and compel testimony has long been recognized as a necessary incident of judicial power. The power to punish for contumacious refusals to testify is particularly necessary in criminal proceedings[7] and is but a corollary of the well established principle that "the public has a right to every man's evidence," 8 Wigmore, *Evidence*, § 2192, p. 70,

[7] The contempt power is not restricted to disobedience of court orders in criminal proceedings. See, *e.g.*, *Hickman* v. *Taylor*, 329 U.S. 495.

(McNaughton rev. 1961). It may be valuable not only to the prosecution but to defendants who wish to compel testimony which is expected to be exculpatory.

This power was recognized by English common law and carried over to the colonies, where it was established both as a principle of common law and as a power conferred by statute. See Fox, *The Summary Process to Punish Contempt*, 25 L.Q. Rev. 238 (1909); *United States* v. *Barnett*, 376 U.S. 681, 701–724 (Appendix to Opinion of the Court). Both colonial and early state legislation reaffirmed that failure to appear when summoned as a witness or failure to testify was punishable as contempt. See the Appendix to the Brief of the United States in *Harris* v. *United States*, 382 U.S. 162 (No. 6, October Term, 1965).

American courts have always recognized that refusal to testify may constitute criminal contempt. See, *e.g.*, *Whittem* v. *The State*, 36 Ind. 196, 212; *The People, ex rel. Hackley* v. *Kelly*, 24 N.Y. 74, 80. As this Court observed in *Ex parte Hudgings*, 249 U.S. 378, 382: "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement."

Thus, refusal to testify is conduct punishable as contempt under 18 U.S.C. 401(3), and, as we shall now show, the district court properly employed the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure.

II. THE DISTRICT COURT PROPERLY EMPLOYED THE SUMMARY PROCEDURES OF RULE 42(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42(a) of the Federal Rules of Criminal Procedure provides that a criminal contempt "may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." All other criminal contempts must be prosecuted upon notice pursuant to Rule 42(b). These provisions reflect the common law rule and the prevailing practice in this country. *Bloom* v. *Illinois,* 391 U.S. 194, 209; *Baker* v. *Eisenstadt, supra,* 456 F. 2d 382 (C.A. 1), certiorari denied, 409 U.S. 846.

The decision of the court of appeals is squarely in conflict with the plain and unambiguous language of Rule 42(a). Rule 42(a) expressly provides that summary procedures may be employed to punish contempts occurring in the "actual presence of the court." While it was arguable in *Harris, supra,* that the contempt there involved did not occur in the "actual presence of the court," there can be no such suggestion in the present case. Thus, unlike *Harris,* the court of appeals' decision in this case cannot be founded on a construction of the language of Rule 42(a); rather, the decision is necessarily based on an unarticulated assumption that constitutional considerations require use of notice and hearing procedures even where the contempt occurs in the "actual presence of the court." This assumption has no basis in either logic or precedent.

1. THE HISTORY OF THE SUMMARY CONTEMPT POWER

The summary power to punish contempts of court is rooted in the oldest principles of Anglo-American jurisprudence.

> The power, which the Courts * * * have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it.

The King v. *Almon,* 97 Eng. Rep. 94, 99 (citation omitted). Acts of contempt committed in the presence of the court have been punishable by summary process in England at least since the fourteenth century.[8] Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 252, 365.

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[8] Summary punishment was used even when the contemnor was not immediately apprehended. A writ of attachment issued at the discretion of a judge of any court of record for a contempt committed in the face of the court. The writ might be based upon facts within the judge's own knowledge, without indictment or information. When the contemnor was then brought before the court, summary procedure was employed:

"[F]or * * * this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practised and is certainly now established as part of the law of the land.

* * * * *

"[B]ut we apprehend it must be for a contempt in the face of the court * * * and, if for a contempt in the face of the court, the commitment is by rule of the court, not on process, unless the party escape out of court before he is secured."

Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 251, quoting Jacob's Law Dictionary (9th ed., Ruffhead & Morgan, 1772).

The power to impose summary punishment was available not only with respect to conduct manifesting outright disrespect for the court or its judges, but also for resistance of the court's process and for disobedience, in the court's presence, of a direct order of the court. *The King* v. *Almon, supra,* 97 Eng. Rep. at 99, 104.[9] The concept of contempt embraced "[a]ny act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases." Beale, *Contempt of Court, Criminal and Civil,* 21 Harv. L. Rev. 161, 162 (1908). By the eighteenth century, the mode of punishment depended upon whether the contempt had been committed in the face of the court or out of the court's presence. Direct contempts were punished by immediate commitment, while for indirect contempts the contemnor was summoned before the court by writ of attachment. Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 367.

The concept of summary process for direct contempts is equally firmly rooted in the jurisprudence of the United States. It is clear that, for contempts *in facie,* punishment can be imposed immediately, without formal notice, plea, or trial, since the presiding

[9] Originally the jurisdiction of the common law courts summarily to punish disobedience to lawful process was founded upon their authority to punish disobedience to the King's writ. Fox, *The King* v. *Almon,* 24 L. Q. Rev. 184, 276–277 (1908). Contumacious treatment of process "is a contempt of the king's command, and * * * disobedience to the king's command was always punished by summary process." Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 249.

judge has personal knowledge of the facts of the contumacy. See, *e.g., Fisher* v. *Pace,* 336 U.S. 155, 159–160; *Whittem* v. *The State, supra,* 36 Ind. at 211–212; *Cartwright's Case,* 114 Mass. 230, 238; *The People, ex rel. Hackley* v. *Kelly, supra,* 24 N.Y. at 80; Beale, *Contempt of Court, Criminal and Civil, supra,* 21 Harv. L. Rev. at 172.

2. THE POLICIES UNDERLYING THE SUMMARY CONTEMPT POWER ARE APPLICABLE TO THIS CASE

The primary distinction between contempts that may be prosecuted summarily and those that require notice and a separate hearing is based upon the place and the circumstances in which the contumacy occurs. Rule 42(a) is applied only where the presiding judge is a witness to the occurrence. "If he must depend upon the testimony of other witnesses or the confession of the contemnor for his knowledge of the offense, Rule 42(a) does not apply." *United States* v. *Marshall,* 451 F. 2d 372, 374 (C.A. 9). The purpose of a Rule 42(b) hearing "is to inform the court of events not within its own knowledge." *Sacher* v. *United States,* 343 U.S. 1, 9; see also *Carlson* v. *United States,* 209 F. 2d 209 (C.A. 1).[10]

Additionally, since the summary power is intended to be used where immediate action is required to vindicate the dignity and authority of the court, it must be employed at the time of contempt. See *Taylor* v.

[10] Thus, it has been held that a contumacious letter addressed to the judge or a failure to appear for a scheduled hearing does not take place in the actual presence of the court and does not justify the use of the summary power. *Cooke* v. *United States,* 267 U.S. 517; *United States* v. *Willett,* 432 F. 2d 202 (C.A. 4).

Hayes, No. 73–473, decided June 26, 1974, slip op. at 9–10; *Codispoti* v. *Pennsylvania*, No. 73–5615, decided June 26, 1974, slip op. at 9. Accordingly, a state legislature was precluded from summarily punishing a contemnor who had disrupted its proceedings two days earlier, when no action had been taken at the actual time of the contempt. *Groppi* v. *Leslie*, 404 U.S. 496.[11]

In the present case the refusals to testify occurred in the presence of the court after the court had granted respondents immunity and informed them that continued refusal to testify would result in a finding of contempt. In addition, respondents had an opportunity to offer an explanation for their conduct. Here, unlike the situation which this Court disapproved in *Groppi* v. *Leslie*, *supra*, 404 U.S. at 504:

> [T]he contemnor is present * * *. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, * * * the contemnor has * * * been given an opportunity to speak in his own behalf in the nature of a right of allocution.

[11] This Court's recent decisions in *Taylor* v. *Hayes*, *supra*, and *Codispoti* v. *Pennsylvania*, *supra*, have no bearing on the propriety of the use of summary process in the instant case. Both concerned situations in which contemnors were punished summarily *after* a trial for contempts committed during the trial. The Court held that the right to a plenary hearing exists in a postponed contempt adjudication where there is no need for instant action, but distinguished situations where the contempt is adjudicated summarily because of a need immediately to vindicate the court's authority. *Taylor* v. *Hayes*, *supra*, slip op. at 9–10; *Codispoti* v. *Pennsylvania*, *supra*, slip op. at 7–9.

There was simply no reason to resort to the notice and hearing procedures of Rule 42(b) in this case.[12] On the contrary, there were good reasons for utilizing the summary procedures of Rule 42(a). Not only did such a course provide immediate vindication of the authority of the court, whose direct order had just been flouted, but it provided the best chance of overcoming the witnesses' recalcitrance. While the primary purpose of criminal contempt is punitive and the contemnor cannot automatically obtain his release by compliance with the court's order (*e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258; *Baker* v. *Eisenstadt*, 456 F. 2d 382 (C.A. 1), certiorari denied, 409 U.S. 846), the penalty imposed for the contempt frequently is, as here, made provisional; the witness therefore knows that a change of heart may lead to reduction or even elimination of the penalty and may accordingly be motivated to provide the needed testimony. Indeed, in the context of a criminal trial, it is this swift sanction for criminal contempt that is more likely to be effective in coercing obedience to the court's orders than the traditional coercive sanction of civil contempt. In this case, for example, while respondents could have been summarily sentenced for civil contempt, such a proce-

[12] There is no doubt that a peaceable refusal to testify, no less than violent or disrespectful behavior, may be punished as a criminal contempt of court. See *Yates* v. *United States*, 355 U.S. 66, 72; *Ex parte Hudgings*, *supra*, 249 U.S. at 382. When this act of recalcitrance takes place in the presence of the court and obstructs the administration of a trial, it is entirely appropriate to employ the summary powers which are generally applicable to such contempts.

dure would have been futile since respondents were already incarcerated.[13]

Although the facts constituting the contempt were within the personal knowledge of the trial court, the court of appeals nevertheless held summary procedures inapplicable because their use may have precluded respondents from presenting matters in mitigation of their contempts. In our view this consideration was erroneously invoked and is wholly inadequate to justify disregard of the plain language of Rule 42(a).

Respondents were afforded an opportunity to be heard prior to sentencing, and neither respondents nor their counsel suggested any valid defense to the contempt charges. As noted earlier, the court of appeals correctly held that the grants of immunity were dispositive of respondents' privilege claims; therefore, no purpose would have been served by a further hearing on this issue.[14] Finally, the court of appeals' reference to the possibility of a psychiatric defense in Wilson's case, aside from being wholly speculative, reflects a mis-

[13] Even when a recalcitrant witness in a criminal trial is not already incarcerated, the civil contempt sanction is unlikely to provide a substantial incentive to obey the court's order, since a criminal trial, unlike a grand jury, is ordinarily of relatively short duration.

[14] We note that, in our view, entirely apart from the grants of immunity, the privilege against self-incrimination was not available to respondents since they had already pleaded guilty to charges in connection with the robberies. The privilege protects against compulsion to give testimony that could lead to conviction, and accordingly conviction terminates the privilege because there can be no longer a "tend[ency] to incriminate." 8 Wigmore, *Evidence* § 2279, p. 481 (McNaughton rev. 1961). See *Reina* v.

(Continued)

understanding of the record.[15] The logical outgrowth of the court of appeals' line of reasoning would be that summary contempt procedures may *never* be used, since there is always the theoretical possibility that a defense could be developed for presentation at a delayed hearing that does not occur to the contemnor's lawyer at the time, even if the contempt takes the form of violent or disrespectful conduct (this is obviously so with respect to a possible insanity defense).

Respondents were not precluded from offering matters in mitigation; indeed, they could have done so subsequent to being sentenced. As this Court observed in *Groppi* v. *Leslie, supra,* 404 U.S. at 506, n. 11, "[m]odification of contempt penalties is common where the contemnor apologizes or presents matters in mitigation." In this case, moreover, Judge Lasker expressly made the sentences imposed provisional (see note 5, *supra*).

(Continued)
United States, 364 U.S. 507; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2).

Moreover, we note that it is unlikely that respondents' testimony would have had any bearing on sentencing. Their participation in the robberies was known as a result of their guilty pleas and their testimony was sought for information as to Anderson's participation in the robberies.

[15] Wilson's psychological problems were called to the court's attention in connection with sentencing in the context of a request that he be given probation with the understanding that he seek counseling (App. 12–13). Wilson had been examined by a court-appointed doctor to determine his competency to stand trial (App. 11), and competency was not an issue at the time of his refusal to testify. There is not the slightest suggestion that Wilson was unaware of the nature and consequences of his refusal to testify or that a mental disorder prevented him from complying with the court's order.

This Court has cautioned that the obligation to testify admits of few exceptions. See, *e.g., United States* v. *Calandra,* No. 72–734, decided January 8, 1974. There is no reason to require the delay involved in the notice and hearing procedures of Rule 42(b) merely on the possibility that matters in mitigation or defense might be developed. In the unlikely event that such matters are discovered or developed after sentencing, relief may be sought by a motion for modification or vacation of the adjudication. The summary procedures of Rule 42(a) thus provide adequate protection for defendants without sacrificing the need for prompt action to prevent undue disruption of ongoing proceedings.

III. THE COURT BELOW ERRED IN APPLYING THE RULE OF *HARRIS* V. *UNITED STATES* TO THE FACTS OF THE INSTANT CASE

A. In *Harris* v. *United States, supra,* 382 U.S. 162, the petitioner claimed his Fifth Amendment privilege against self-incrimination in declining to answer questions posed by a grand jury, notwithstanding that he had been ordered by the district court to answer following a grant of statutory immunity. He was then brought before the court and asked the same questions by the judge. Upon his continued refusal to answer, Harris was held in criminal contempt of court and sentenced summarily, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

In concluding that the district court had acted improperly in utilizing the summary procedure of Rule 42(a) rather than holding the full, separate hearing prescribed by Rule 42(b), the majority of this Court

rested its decision on the fact that the initial act of contempt—the refusal to answer immediately after being ordered by the court to do so—took place in the grand jury room, outside the presence of the district judge. On this basis, the Court held that a repetition of the contumacy in open court, in an essentially staged proceeding having no independent purpose, did not constitute an independent contempt. Since the actual contempt was committed out of the presence of the judge, Rule 42(a) was deemed inapplicable. 382 U.S. at 164–165.

Leaving open the possibility that Rule 42(a) might be applied to "testimonial episodes" in other circumstances, the Court emphasized the fact that the notice and hearing procedures of Rule 42(b) would not have imperiled or significantly delayed the grand jury proceedings (*id.* at 164), and thus the Court found no indication "that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, was necessary" (*id.* at 165; citation omitted).

Harris represented a departure from the then-existing law (as delineated in *Brown* v. *United States,* 359 U.S. 41, overruled by *Harris*), only insofar as it ruled that a contempt that is initially committed outside the presence of the court does not become a direct contempt when repeated in the presence of the judge. *Harris* recognized the traditional distinction between direct and indirect contempts—that, in the case of direct contempt, the judge is present and is consequently aware of all the facts of the contumacy; thus, a further hearing is unnecessary. The essential reason that Rule 42(a) was deemed inapplicable in *Harris*

was a recognition of the long-standing rule that, for summary punishment to be available, justice requires that the sentencing judge have personal knowledge of all the facts of the contempt. See 382 U.S. at 166–167.

Notwithstanding that the requisite factors justifying summary contempt, which this Court found to be absent in *Harris*, were present here, the court of appeals relied on *Harris* in requiring resort to the notice and hearing procedures of Rule 42(b). The court of appeals' decision in this case is not an isolated example of misapplication of *Harris*; rather, it is the most recent of three decisions of the Second Circuit extending *Harris* to recalcitrance occurring in the actual presence of the court during the course of a trial.

In *United States* v. *Pace*, 371 F. 2d 810 (C.A. 2), the court of appeals acknowledged that the "narrow holding of *Harris*" is

> merely that a district judge may not create a summary disposition case by calling a recalcitrant Grand Jury witness before him to reenact his contempt "in the actual presence of the Court." *Id.* at 811.

Seizing upon the language in *Harris* that Rule 42 (a) was reserved for "exceptional circumstances," however, the court of appeals concluded (*ibid.*):

> Summary disposition is thus available only when immediate punishment is necessary to put an end to acts disrupting the proceedings, such as threats to the judge, disturbances in the courtroom or insolence before the court.

The court ruled that the summary power could not properly be applied to a criminal contempt consisting

of an "orderly refusal in the absence of the jury to answer a question on Fifth Amendment grounds before the taking of any testimony." *United States* v. *Pace, supra*, 371 F. 2d at 811.

The rule of *Pace* was subsequently applied in *United States* v. *Marra, supra*, 482 F. 2d 1196 (C.A. 2), on facts nearly identical to those of the instant case.[16] There, the witness' recalcitrance was based upon a claim of Fifth Amendment privilege after a grant of immunity from prosecution, and the contempt obstructed an ongoing trial. The court of appeals' panel commended the efforts of the judge in *Marra* to safeguard the interests of the witness and intimated that, were it not bound by the precedent of *Pace*, the panel would have been inclined to approve the summary procedure employed by the district court in *Marra* (*id.* at 1200). Under the rule of *Pace*, however, the court found that the trial court was not sufficiently "embarrassed" by the contempt to be warranted in the application of Rule 42(a) (*id.* at 1201). Intimating that Rule 42(a) is applicable only to those criminal contempts defined by subsection 1 of 18 U.S.C. 401 ("misbehavior") and not those defined by subsection 3 ("disobedience to court order"), the court suggested that in the case of a testimonial contempt the court might commit the contemnor instantly for civil contempt, pursuant to 28 U.S.C. 1826, while scheduling for a later date a plenary hearing on criminal contempt charges, pursuant to Rule 42(b). *Id.* at 1201.

[16] In *Marra* the contempt occurred in the presence of the jury. In the instant case, the jury was absent from the courtroom when respondents disobeyed the orders to testify.

The court below expressly held *Marra* to be controlling in the instant case.[17] *Marra* and *Pace*, however, reflect a departure from the general rule that criminal contempts committed in the presence of the court may be prosecuted summarily. *E.g., Groppi* v. *Leslie, supra*, 404 U.S. at 504; *Ex parte Terry*, 128 U.S. 289, 307; *Fisher* v. *Pace, supra*, 336 U.S. at 159–160; *In re McConnell*, 370 U.S. 230, 234. The Second Circuit rule, moreover, manifests an inaccurate interpretation of the *Harris* doctrine. The "exceptional circumstances" to which summary disposition is applied under *Harris* include acts "obstructing court proceedings." *Harris* v. *United States, supra*, 382 U.S. at 164.[18] The Court in *Harris* also assumed for the purpose of its opinion that Rule 42(a) may be applied to "testimonial episodes" in appropriate circumstances. *Id.* at 165. Thus, there is nothing in *Harris* to warrant the Second Circuit's blanket denial that Rule 42(a) may be applied in the case of an orderly refusal to testify at trial. And there is persuasive authority for the view that any contempt committed *in facie* "impl[ies] a purpose to destroy or impair [the court's] authority, [or] to obstruct the transaction of its business." *Ex parte Terry, supra*, 128 U.S. at 307.

[17] The government did not petition for certiorari in *Marra* because of a problem of mootness which is not present here (Marra had completed service of his sentence).

[18] Such obstruction occurred in the instant case. Not only was the Anderson trial interrupted by respondents' contumacy, but Bryan's refusal to testify resulted in the collapse of the prosecution's case against Anderson for the Nanuet bank robbery. (488 F. 2d at 1233; transcript of March 29 and April 2, 1973, pp. 158, 162).

The First Circuit has expressly rejected the interpretation of *Harris* espoused by the court below. In *Baker* v. *Eisenstadt, supra*, 456 F. 2d at 388, the court, on review of a denial of a petition for a writ of habeas corpus arising from a contempt conviction in the state courts, noted that federal Rule 42(a) reflects the common law principle that contempts committed in the presence of the court are punishable summarily. Interpreting this Court's decision in *Groppi* v. *Leslie, supra*, decided subsequent to *Harris*, the First Circuit read as a "categorical" result of *Groppi* that summary proceedings are applicable to *in facie* contempts, including polite refusals to testify, as well as instances of violent or insolent behavior. *Baker* v. *Eisenstadt, supra*, 456 F. 2d at 388.[19]

In extending *Harris* to *in facie* contempts, the Second Circuit has overlooked or misunderstood the important differences between grand jury proceedings and criminal trials. While the life of a grand jury is anywhere from 30 days to 18 months, the normal criminal trial lasts only a few days. Civil contempt may well be ineffective in a trial context, and it is certainly so where, as here, the contemnor is already incarcerated. The delay necessitated by Rule 42(b) procedures would be unlikely seriously to disrupt grand jury proceedings (except where a grand jury is nearing the end of its term), but such delay would have substantial disruptive effects in a trial.

[19] The application of Rule 42(a) to an orderly refusal to testify has also been tacitly approved by the Sixth Circuit in *United States* v. *Searers, supra*, 472 F. 2d at 611 (C.A. 6), where the issue was not expressly raised.

In short, the use of summary procedures was entirely appropriate in dealing with respondents' testimonial refusal at trial. They were given notice that continued recalcitrance would result in contempt, and a plenary hearing was unnecessary since the conduct was observed by the court and respondents were accorded an opportunity to speak by way of allocution. The requirements of due process were fully satisfied, and, in light of the realities of the trial context, summary contempt was "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231.

B. Since the principal factors underlying this Court's decision in *Harris*—the commission of the contempt outside the presence of the court and the absence of a significant possibility of disruption from the use of notice and hearing procedures—are not present in the case of testimonial recalcitrance at trial, we submit that *Harris* simply has no application to this case. If, however, despite our submission, this Court deems *Harris* applicable here, we submit that the policies underlying the summary contempt power require that *Harris* be reconsidered and overruled. We need not repeat here the arguments concerning the merits of the issue presented in *Harris*, which have been made above and in the government's briefs in *Harris* (No. 6, October Term, 1965) and *Brown* v. *United States*, *supra*, 359 U.S. 41 (No. 4, October Term, 1958). We note only that the continuing vitality of *Harris* may be considered to be in some doubt as a result of the approving citation of *Brown* in *Groppi* v. *Leslie*, *supra*, 404 U.S. at 504–505, and *United States* v. *Calandra*, *supra*, No. 72–734, decided January 8, 1974 (slip op. at 7, n. 4).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgments of the district court reinstated.

Respectfully submitted.

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JULY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
OCT 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1162

UNITED STATES OF AMERICA,
Petitioner,

v.

THOMAS JOSEPH WILSON
and
BOBBY ANTONIO BRYAN,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THOMAS JOSEPH WILSON

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and
BOBBY ANTONIO BRYAN,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THOMAS JOSEPH WILSON

QUESTION PRESENTED

Whether a respectful in-court refusal to testify premised on Fifth Amendment grounds can, consistent with *Harris v. United States*, 382 U.S. 162 (1965), be punished without the procedural protection afforded by Rule 42(b), Fed.R.Crim.Proc.

STATEMENT

Respondent Thomas Joseph Wilson was summarily convicted of criminal contempt [18 U.S.C. §401(3)] for refusing to testify at the bank robbery trial of Robert Joel Anderson. Respondent, who had been indicted with Anderson for the robbery of the Empire National Bank in Tuxedo, New York,[1] had, nine days prior to Anderson's trial, pleaded guilty, but had not yet been sentenced when called to testify. Judge Lasker, who was presiding at Anderson's trial, was the judge before whom respondent would be sentenced.

Unable to post bail pending sentence, respondent was brought to the courtroom from Federal Detention Headquarters without subpoena,[2] placed on the witness stand, and asked to testify (App. 4). He refused to answer the prosecutor's questions on the ground that his answers might tend to incriminate him and result in a more severe penalty on the bank robbery charge (App. 3).

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[1] Anderson was also charged in this indictment with robbery of the Nanuet National Bank in Mount Ivy, New York. In a separate indictment assigned to the Hon. Irving Ben Cooper, respondent Bobby Antonio Bryan was charged with helping Anderson commit that crime. Bryan was also called by the Government as a witness in Anderson's trial. Despite the sequence of the transcripts in the appendix, which indicates that respondent was called before Bryan, the trial record establishes that the reverse is true and that Bryan's refusal to testify and his conviction for contempt occurred first.

[2] Defense counsel objected in vain to this circumvention of Rule 17, Fed.R.Crim.Proc. (App. 4).

Acknowledging that the pendency of Wilson's sentence for the bank robbery was a "relevant legal consideration" to his obligation to testify, Judge Lasker attempted to sentence respondent immediately (App. 4). However, after hearing a description of respondent's psychiatric problems[3] and general background from defense counsel and the probation department, Judge Lasker concluded, "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson" (App. 6-14).

Unable to obviate respondent's claim of possible prejudice to him on his sentence for the bank robbery, Judge Lasker concluded that respondent could not be forced to testify (App. 14).[4] The court also rejected the Government's suggestion that respondent be given a provisional maximum sentence, subject to the result of a ninety-day study and observation, explaining that he

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[3] A psychiatric examination ordered by the district court for the purpose of the bank robbery sentence asserted that, because of a schism with his family, respondent viewed himself as an "unworthy and hopeless individual." Respondent had also received a medical discharge from the Navy due to emotional maladjustment. Judge Lasker, in weighing sentencing alternatives as to the bank robbery, acknowledged respondent's need for psychiatric treatment (App. 11-13).

[4] Although the judge did not here explain his reasons for this decision, he had earlier, at Bryan's contempt proceeding, articulated that there was "no way" to insulate from a sentencing judge's knowledge either the substantive testimony given or the refusal to testify itself (App. 24).

would not impose an arbitrary sentence merely to accommodate the Government.[5]

Nonetheless, after hearing further argument by the Government, Judge Lasker reversed himself and concluded that although respondent had not been sentenced, the Government's offer of immunity was sufficient (App. 15-17). Accordingly, he granted immunity and ordered respondent to testify (App. 17-18). Despite her request, at no time was counsel afforded an opportunity to research the immunity issues raised (App. 5-6).[6] When respondent adhered to his Fifth Amendment privilege, Judge Lasker immediately convicted him of criminal contempt and sentenced him to six months' imprisonment, to run consecutively to the sentence yet to be imposed for the bank robbery[7] (App. 19, 20). The sentence was provisional and subject to the court's receipt of additional information about respondent (App. 18). Execution of the sentence was stayed pending appeal (App. 19).

The court of appeals unanimously reversed, holding that the district court erred in proceeding under Rule

[5] The court also expressed the view that, while not cumulative, respondent's testimony was not essential, as two other witnesses could identify Anderson (App. 15). As it turned out, even without respondent's testimony Anderson was convicted in a second trial of the Empire Bank robbery.

[6] Not only did defense counsel request a brief continuance to enable adequate preparation of a defense, she also specifically objected to this "hasty" determination of the contempt issue (App. 5).

[7] Respondent was eventually sentenced for the bank robbery to an indefinite term of imprisonment as a youthful offender, pursuant to 18 U.S.C. § 5010(b). He is presently serving that sentence.

42(a) rather than 42(b). Relying on *Harris v. United States*, 382 U.S. 162 (1965), the court ruled, as it had on a prior occasion, that the extraordinary remedy of summary contempt was "inappropriate in the case of an orderly refusal to testify on Fifth Amendment grounds despite a grant of immunity" (Pet. App. 22).

SUMMARY OF ARGUMENT

The court of appeals, relying on *Harris v. United States*, 382 U.S. 162 (1965), correctly held that an orderly and respectful in-court refusal to testify could be punished only after the hearing afforded by Rule 42(b), Fed.R.Crim. Proc. The Government proffers the theory that because the conduct occurred in the presence of the judge, a hearing was unnecessary, and that immediate, summary punishment pursuant to Rule 42(a) was appropriate.

The Government's argument ignores the express language of *Harris*, which limits the use of summary punishment to "exceptional circumstances" constituting "misbehavior." Only the exigencies of a situation engendered by misbehavior occurring in open court and resulting in destruction of the dignity and civility of the court and its process justify circumvention of the procedural safeguard of Rule 42(b). Disobedience, the conduct in question here, is not of the type punishable by summary proceeding, for it can be satisfactorily treated after application of procedural protections.

The distinction between misbehavior and disobedience is historically based, and has been used to prevent abuse of the contempt power. Further,

the function of the hearing under 42(b) is not simply, as the Government would have it, to allow resolution of factual issues, but also to enable counsel for the contemnor to present legal defenses to the contempt and factors in mitigation of the sentence.

The Government suggests that these safeguards should nonetheless be abandoned because summary contempt is necessary to procure testimony of recalcitrant witnesses. This theory is not only inapplicable to the facts of this case—conviction here imposed purely as punishment for refusal to testify—but also is alien to contempt law which provides that civil, rather than criminal, contempt is the remedy. The proper procedure is the immediate imposition of the civil sanction followed, should that fail, by imposition of the criminal penalty after notice and a hearing. In those rare instances where the testimony is essential and previous incarceration renders the civil sanction ineffective, thereby compelling government reliance on the incidental coercive effect of the criminal penalty, a brief adjournment of the on-going proceedings to enable a Rule 42(b) hearing before conviction is the proper procedure.

ARGUMENT

A RESPECTFUL IN-COURT REFUSAL TO TESTIFY PREMISED ON FIFTH AMENDMENT GROUNDS CANNOT, CONSISTENT WITH *HARRIS v. UNITED STATES*, 382 U.S. 162 (1965), BE PUNISHED WITHOUT THE PROCEDURAL PROTECTIONS PRESCRIBED BY RULE 42(b), FED.R.CRIM. PROC.

I

The court of appeals held that an orderly refusal to testify is not an exceptional circumstance justifying the summary procedure of Rule 42(a) of the Federal Rules of Criminal Procedure. The court's ruling was based on its reading of *Harris v. United States*, 382 U.S. 162 (1965), which the Government argues was erroneous because *Harris* must be read to hold that the applicability of Rule 42(a) is governed solely by the place of the alleged contempt, not its nature. Although the conduct in *Harris* occurred before the grand jury, the Court's language and extensive analysis of Rule 42 renders untenable the Government's simplistic *situs* formula.

Harris was decided in the context of the "concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power[8]

[8] In 1831, the abuses of a federal district court judge named James Peck led to the termination of the broad authority granted by Section 17 of the Judiciary Act of 1789 to "... punish by fine or imprisonment, at the discretion of said court, all

and . . . the wording of the Rule." 382 U.S. at 164. Thus, it is stated that because it "prescribes the procedural regularity of all contempts in the federal regime" (*Id.* at 167), Rule 42(b) "is the normal procedure." *Id.* at 164. On the other hand, Rule 42(a) was specifically "reserved 'for exceptional circumstances' such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." 382 U.S. at 164, citing *Brown v. United States*, 359 U.S. 41, 54 (1959) (dissenting opinion). Consequently, "[s]ummary contempt is for 'misbehavior' in the 'actual presence of

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contempt of authority in any case or hearing before the same . . . " 1 Stat. 83. To replace Section 17, Congress passed the Act of 1831, which drastically limited the power to punish for criminal contempt. In only three instances was it possible: misbehavior in the presence of the court; misbehavior of court officials in their official transactions; and disobedience of or resistance to the lawful writ, process, order, or decree of the court. 4 Stat. 487.

This concern for abuse of the power also found expression in judicial decisions which drastically curtailed the substantive scope of the power. *Anderson v. Dunn*, 6 Wheat. 204, 231, (1821) ("least possible power to [achieve] the end proposed"); *In re Michael*, 326 U.S. 224, 227 (1945). The type of punishment that can be imposed was limited [*In re Bradley*, 318 U.S. 50 (1943); *Ex Parte Robinson*, 19 Wall. 505, 512 (1873)], as were the offenses to which the statute applied [*Nye v. United States*, 313 U.S. 33, 48 (1941); *In re Michael, supra*, 326 U.S. 224] and the category of persons to whom it extended [*Cammer v. United States*, 350 U.S. 399 (1956)].

Similar concern is manifest in the procedural protections that have been afforded. *Cooke v. United States*, 267 U.S. 517, 536 (1925) [hearing and counsel]; *Bloom v. Illinois*, 391 U.S. 194 (1968) [right to jury trial in serious contempt cases]; *Taylor v. Hayes*, 94 S. Ct. 2697, 2704 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Cooke v. United States, supra*, 267 U.S. at 539 [right to an impartial judge].

the court,' " where " 'summary vindication of the court's dignity and authority' " is essential. And the Court's reliance on only *Ex Parte Terry*, 128 U.S. 289 (1888), and *Cooke v. United States*, 267 U.S. 517 (1925), cases involving violent conduct in the courtroom and insolent behavior toward the bench, gives meaning to "misbehavior" as a term of art in the context of contempt law.

"Misbehavior" is historically quite distinct from simple "disobedience" to a court order. From earliest times contempt with respect to the latter has been deemed "entirely different in its nature and origin" from contumacious acts which physically disturb the court. Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164 (1908). Indeed, disobedience of a court order, previously the Writ of the King, is the original predecessor of civil, not criminal contempt.[9] Fox, THE HISTORY OF CONTEMPT OF COURT, 1 (1927).[10] The distinction is, of course, reflected in the

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[9]The Government's failure to recognize this fundamental distinction explains the error of its conclusion that historically, disobedience was subject to summary criminal punishment (Br. at 11-13). While disobedience may have been dealt with summarily, it was treated exclusively as civil and not criminal contempt. Beale, *Contempt of Court, Criminal and Civil, supra*, 21 Harv. L. Rev. at 164; Fox, THE HISTORY OF CONTEMPT, 1, 3 (1927).

[10]The distinction between "misbehavior" and "disobedience of a court order" prevailed in the colonial period and appears in the early precursors of present contempt laws. Without exception, these historic antecedents establish that each of the thirteen colonies enacted statutes which dealt separately with refusal of witnesses to testify. See Appendix to the Government's Brief in *Harris v. United States* (No. 6, October Term, 1965).

In each of eleven colonies which enacted separate statutes for misconduct in the presence of the court [excepting Georgia and

very statute under which this case arises. Compare 18 U.S.C. §401(1) with 18 U.S.C. §401(3). Thus it is not accidental that cases before this Court involving misbehavior involved instances of violence, disorder, physical disruption, and insolence. *Ex Parte Robinson*, 19 Wall. 505 (1783); *Ex Parte Terry, supra*, 128 U.S. 289; *In re Savin*, 131 U.S. 267 (1889); *Cooke v. United States, supra*, 267 U.S. 517; *Sacher v. United States*, 343 U.S. 1 (1952); *Offutt v. United States*, 348 U.S. 11 (1954).

When abusive language is uttered in open court, physical violence is threatened or actually occurs, or insolence is demonstrated, the dignity and civility of the court and its process are challenged. The urgency of the situation is self-evident, and summary action is required "to protect the judicial institution itself." *Harris v. United States, supra*, 382 U.S. at 167; *cf. Ex Parte Terry, supra*, 128 U.S. at 209; *Cooke v. United States, supra*, 267 U.S. at 536. Where, however, there is simple disobedience to a court order, the integrity and dignity of the court is not in issue,[11] and the situation

North Carolina] it was clear that the acts envisioned were those of violence, disorder, disrespect, *i.e.*, swearing, tobacco chewing, leaving the courtroom before discharge, and noise. *Id.* at 10-12, 33, 60-61, 117, 172, 187, 212, 267, 297, 343.

[11]Indeed, refusal to comply with a court order to testify, absent special elements of contumacy, may well be viewed as resistance not to the court, but to parties to the litigation. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 442 (1911). See also Appendix to the Brief of the United States in *Harris, supra*, which demonstrates that the majority of local colonial governing bodies provided that the refusal to testify would result in imprisonment (until compliance) or a compensatory fine.

is not the "exceptional" or "unusual circumstance" of which *Harris* speaks. See also *Bloom v. Illinois*, 391 U.S. 194, 208-09 (1968). Thus, *Harris* and history mandate that the applicability of Rule 42(a) turns not only on the place of the contempt, but on the nature and effect of the conduct in question.[12]

II

The Government also argues (Br. at 13) that when the facts surrounding the contempt are within the judge's personal knowledge there is no need for a hearing because the primary purpose of the Rule 42(b) proceeding is to resolve disputed issues of fact. While factual inquiry is, of course, one of the purposes of the hearing, it is not its only function.[13]

In both *Harris v. United States, supra*, 382 U.S. at 163, and *Cooke v. United States, supra*, 267 U.S. at 537, the procedural protections of Rule 42(b) were mandated despite the absence of a factual issue as to the contempt itself in order to ensure the opportunity to present legal defenses, propose alternative procedures, and present facts in mitigation.

In this case, had she been given the opportunity, there was much that counsel could have done pursuant

[12]Even the cases cited by the Government (Br. at 22) to establish the "general rule" that contempt committed in open court is summarily punishable are all cases of misbehavior.

[13]In fact, even if the contempt occurred in the presence of the court, jury trials are constitutionally mandated when the penalty imposed is more than six months. *Bloom v. Illinois*, 391 U.S. 194 (1968). See also *Taylor v. Hayes, supra*, 94 S. Ct. at 2702-04, where a hearing was mandated despite the judge's personal knowledge of all the facts.

to the plenary procedures of 42(b).[14] Since respondent had not been sentenced and could still move to withdraw his plea, counsel could have developed a defense based on the transactional immunity provisions of 18 U.S.C. §§2514, 2516.[15] *In re Veriker*, 446 F.2d 244 (2d Cir. 1971). Counsel could also have obviated the necessity of a contempt finding by proposing the very procedure described in the court of appeals decision—that the record of respondent's testimony be sealed and the matter referred to another judge for sentencing. (Pet. App. 21). Indeed, not only did the district court ignore this possibility, it fostered the belief, to respondent's detriment, that there was no manner in which he could be protected at sentence from prejudice caused by his testimony.

Finally, counsel could have developed all factors germane to sentencing as contemplated by *Harris* itself:

> . . . [A] hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or

[14]The Government's reliance on the fact that counsel presented no defense (Br. at 16) is disingenuous since the absence of a legal defense is necessarily the result engendered by refusal to provide notice and a hearing.

[15]Respondent was granted use immunity under 18 U.S.C. §§6002-6003. However, since he was indicted for bank robbery (18 U.S.C. §2113) and was being questioned about that very crime, it was indeed arguable that he was entitled to the broader immunity afforded by 18 U.S.C. §§2514 and 2516. Although repealed, these provisions do not become inoperative until December 15, 1974. See Pub.L. 91-452, Title II, §227(a), enacted October 15, 1970, but "effective four years following the sixteenth day after the date of enactment . . . ."

> suspicion but will come to the sentencing stage of the proceeding with insight and understanding.
>
> 382 U.S. at 167.

In this case respondent received the maximum penalty despite evidence which, even on this paltry record, suggested that his refusal to testify stemmed from emotional difficulties. In fact, it was the very absence of adequate psychiatric evaluation that precluded the district court from sentencing respondent immediately on the bank robbery charge despite the court's strong wish to avoid the contempt issue by doing so. Thus the court of appeals correctly observed that

> [w]ith additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of [Wilson's] mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness.
>
> (Pet. App. 24).

> Therefore, contrary to the Government's assertion (Br. at 18), this record is not silent with respect to mitigating circumstances. Moreover, as the Court itself, noted in *Harris v. United States, supra*, 382 U.S. at 166, a silent record is the beginning, not the end, of the inquiry.[16]

[16]The Government is also wrong when it suggests Judge Lasker's willingness to entertain a later motion for reduction of sentence compensates for the deficiencies of the sentencing procedure under 42(a). Such procedure is improper under *United States v. Manuella*, 478 F.2d 440 (2d Cir. 1973), as was argued below. However, the court did not have to reach this issue.

III

The Government's final argument that summary imposition of the criminal sanction is justified because it is the only device that will produce desired testimony is also misconceived. It is civil, not criminal contempt, which is designed to secure compliance. As the Court wrote in *Shillitani v. United States*, 384 U.S. 364 (1966):

> "It is not the fact of punishment but rather its character that distinguish" civil from criminal contempt. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911). Despite the fact that [petitioners] were ordered imprisoned for a definite period their sentences were clearly intended to operate in a prospective manner—to coerce rather than punish. As such, they must relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify.
>
> 384 U.S. at 369-70.

Nothing serves to demonstrate the foregoing more than the facts in this case. Judge Lasker did not impose this criminal sentence to coerce respondent's testimony. The record is clear that the sentence was imposed as punishment for refusal to testify: no expectation that the sentence would produce compliance was expressed, and there was no promise of sentence reduction should respondent change his mind. The sentence was made "provisional" strictly because the judge was without sufficient information to arrive at a proper sentence. Moreover, the possibility of even inadvertent coercion

was precluded when the sentence was stayed pending appeal. As Judge Lasker stated:

> I will stay the execution of the sentence until the appeal is determined and I will consider a reduction of the sentence should the appeal affirm my ruling *so that I don't think anybody needs to be worried about the situation at the moment.*
>
> (App. at 19-20. *Emphasis added*).

Assuming arguendo[17] that civil contempt will not effectuate compliance, the criminal sanction does not, *ipso facto*, become legitimate for that purpose. Criminal contempt which seeks to vindicate the court's authority is punitive in purpose. *Shillitani v. United States, supra*, 384 U.S. at 370; *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. at 442-43. Its liability is greater than civil contempt for not only does it penalize, it stigmatizes a contemnor with a criminal conviction. *Bloom v. United States, supra*, 392 U.S. at 201; *Gompers v. United States*, 233 U.S. 604, 610 (1914).

That a criminal contempt sanction may have an incidental coercive effect does not eradicate the distinction between civil and criminal contempt.

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[17]The Government's assertion (Br. 16) that in the instance of short trials or where, as here, the witness is already incarcerated, criminal contempt must be used in place of the civil remedy to coerce testimony finds no support in fact or law. This theory indulges in pure speculation by concluding that even a short period of incarceration pursuant to a civil contempt order will not produce compliance. The sting of imprisonment, however brief, will have a strong impact on most men. In respondent's case, imposition of a criminal penalty merely because he was already incarcerated due to indigence itself raises constitutional questions of substance. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

Shillitani v. United States, supra, 384 U.S. 364. Nor can the coercive effect be used in a bootstrap fashion to circumvent the procedural safeguards normally attendant on the criminal sanction. If the Anderson trial could not have continued without respondent's testimony, an hypothesis boldly contradicted by the record,[18] it was open to the judge to adjourn the proceedings for a short period of time to hold a Rule 42(b) hearing. This would have insured respondent's procedural rights without impairing the on-going trial. *Harris v. United States, supra*, 382 U.S. at 164.

It is also doubtful that immediate rather than subsequent imposition of a criminal sanction would be successful in procuring testimony. Disobedience is best overcome by the knowledge that a continuing failure to cooperate will result in severe punishment. See *Sacher v. United States, supra*, 343 U.S. at 37 (Mr. Justice Frankfurter, dissenting). In contrast, the finality of a criminal sentence, rather than encouraging compliance with an order to testify, may well, because the penalty has already been imposed, make the decision not to testify immutable. In short, as one might say, the significance of the Damocletian sword is not that it falls, but that it hangs.[19]

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[18]Judge Lasker was obviously correct when he found that the testimony was not essential, since Anderson was eventually convicted without it.

[19]Moreover, since the power to grant motions for a reduction of sentence pursuant to Rule 35 is purely discretionary [*Brown v. United States, supra*, 359 U.S. at 56 (dissenting opinion); *Flores v. United States*, 238 F.2d 758 (9th Cir. 1956)], the prospect of a possible reduction is far less certain or attractive than the guarantee of release from incarceration imposed pursuant to civil contempt or the likelihood that criminal sentence could be avoided by cooperation.

The procedure for dealing with recalcitrant witnesses, suggested by the Court and adopted by the court of appeals, provides that a judge intent upon obtaining testimony can immediately give the witness notice of a charge of criminal contempt and summarily incarcerate the witness for civil contempt pursuant to 28 U.S.C. §1826(a). If and when the civil remedy fails, the judge is then free to conduct a Rule 42(b) hearing to determine whether the witness should be convicted of criminal contempt and punished. *Yates v. United States*, 355 U.S. 66, 75 (1957); see also *Rex Trailer Co. v. United States*, 350 U.S. 148, 150 (1956); *United States v. United Mine Workers*, 330 U.S. 258, 299 (1947); *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. at 452; *United States v. Marra*, 482 F.2d 1199, 1202 (2d Cir. 1973).

Initial resort to the civil sanction ensures that "the least possible power to the end proposed" will be used. *Shillitani v. United States, supra*, 384 U.S. at 371; *Anderson v. Dunn, supra*, 6 Wheat. at 231. Moreover, there is no diminution of the judge's power to incarcerate or to protect the process. As with summary criminal contempt, the recalcitrant witness is immediately imprisoned, but when punishment is called for it can be achieved without depriving him of the procedural protections which are designed to enhance the accuracy of the proceeding.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 26 1974
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1974

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BRIEF FOR RESPONDENT BOBBY ANTONIO BRYAN

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BRIEF FOR RESPONDENT BOBBY ANTONIO BRYAN

QUESTION PRESENTED

Whether Rule 42 of the Federal Rules of Criminal Procedure, or the Due Process Clause of the Fifth Amendment requires that a witness who, in an orderly manner, refuses to testify at a trial be given a hearing before he is sentenced to serve six months in prison?

STATEMENT

On March 30, 1970, Respondent Bobby Antonio Bryan was called to testify at the trial of one Robert Anderson on Indictment 73 Cr. 147. Since Bryan's attorney, Mr. Brown, was not available on that day, the Court assigned Mrs. Hermann, a member of the Legal Aid staff, to represent Bryan (A. 24-25).

Prior to Bryan actually being called to the stand, the Government and the Court indicated that if Bryan asserted his Fifth Amendment privilege, he would be granted immunity. Mrs. Hermann, speaking on Bryan's behalf, noted that Bryan had recently been sentenced on his plea of guilty on a related indictment, 72 Cr. 1190, to the maximum sentence possible pursuant to the provision of 18 U.S.C. Section 4208(b), and that he was to be resentenced in the future, after the study provided for by that statute had been completed. Mrs. Hermann argued that any grant of immunity to Bryan would not be co-extensive with his Fifth Amendment privilege because the judge who would resentence Bryan might base that sentence on facts elicited during Bryan's testimony (A. 23-28).

Bryan was then called to the stand and the following occurred:

> "Q. Mr. Bryan, On October 10, 1972, did you along with the defendant Robert Anderson, commit a bank robbery in the Nanuet National Bank, Mount Ivy, New York?
>
> A. I Refuse to answer the question on the ground they might tend to incriminate me.
>
> Mr. Feinberg: I would ask the Court to instruct the witness that he has to answer the question posed.

> The Court: Mr. Bryan, I do instruct you that you must answer those questions. As I understand it you have pleaded guilty to that very bank robbery and therefore I fail to understand how you are admitting that you did commit the bank robbery at this time can incriminate you?
>
> The Witness: Your Honor–
>
> The Court: Say what you wish.
>
> The Witness: I have pleaded to an assault with a weapon. I have not pleaded to a bank robbery.
>
> The Court: Is that so?
>
> The Defendant: That is so.
>
> The Court: If that is so I would agree with you.
>
> Mrs. Herman: I have no personal knowledge of that.
>
> Mr. Kahn (attorney for the defendant Anderson): That is so. I refer your Honor to the affidavit of Mr. Brown.
>
> The Court: You are correct, Mr. Bryan, and I sustain your refusal to answer the last question. At least let me state that Judge Cooper's sentence indicates, filed March 20, that Mr. Bryan pleaded guilty to knowingly and wilfully and unlawfully assaulting persons and putting in jeopardy the lives of persons by the use of dangerous weapons and devices, et cetera." (A. 29)

At the request of the Government, the Court then conferred immunity on Bryan pursuant to 18 U.S.C. Section 6003 and the questioning continued:

> "By Mr. Feinberg
>
> Q. Mr. Bryan, do you know the defendant Robert Joel Anderson?
>
> A. I refuse to answer the question on the ground that it might tend to incriminate me.

The Court: Mr. Bryan, I am directing you to answer that question because it can no longer tend to incriminate you since I have conferred upon you immunity from prosecution.

The Witness: Your Honor, the question in point, I did not ask for this immunity.

The Court: You did not ask what?

The Witness: I was not asked for this immunity.

The Court: I know, Mr. Bryan, but it isn't necessary for you to ask. The Government has the right to ask me to confer it on you whether you want it or not. I am telling you as the person responsible to tell you what the law is and even Mrs. Hermann will agree with me on this one that you have no right to refuse immunity.

Therefore, I am instructing you that you must answer the question or I will hold you in contempt of Court.

Do you continue to refuse to answer the question?

The Witness: Yes, your Honor.

The Court: All right.

Mr. Bryan, I shall proceed upon due reflection to impose a penalty upon you for your failure to obey the instructions of the Court. At the moment, I am merely ruling that you are in contempt of Court.

I will impose sentence shortly. I ask you to return to the witness room. I would like to confer with counsel where we go from here.

The Witness: Thank you, your Honor.

(Witness excused.)" (A. 31-32)

Shortly thereafter Bryan was brought back into the courtroom and after the Court heard briefly from Mrs. Hermann, Bryan was sentenced to six months in prison consecutive to the sentence imposed pursuant to his guilty plea. The Court made clear, however, that it did not consider the sentence absolute, and that it would consider reducing the sentence after the Section 4208 study that Bryan was then undergoing was completed or after any appeal from the contempt conviction had been completed (A. 33-34).

SUMMARY OF ARGUMENT

The use of summary contempt power "always, and rightly, is regarded with disfavor" *Taylor v. Hayes*, ____ U.S. ____, 94 S. Ct. 2697, 2703 (1974). While this Court has consistently recognized that the courts are empowered to punish summarily disruptive behavior in the presence of the court, *Ex Parte Terry*, 128 U.S. 289 (1888), that power is limited to situations "where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In Re Oliver*, 333 U.S. 257, 275 (1948).

Respondent Bryan's orderly refusal to testify on the ground that the immunity conferred upon him was not co-extensive with his Fifth Amendment privilege was not the type of affront to the dignity of the court that required the imposition of summary punishment. Indeed, given the fact that Bryan's own lawyer was not present on the day in question and given Bryan's obvious confusion concerning the nature of the proceeding to confer immunity, there was every reason to postpone the proceedings to punish Bryan for

contempt for a brief time to allow Bryan's regular attorney to be present.

There is no merit to the Government's argument that *Harris v. United States*, 382 U.S. 162 (1965), should be overruled. Not only is the result in *Harris* supported by the prior decisions of this Court, but, as Justice Stewart noted in his dissent in *Harris*, the need for "consistent guidance to the federal judiciary" as to the application of the rules promulgated by the Court, is a factor which should be weighed heavily before any decision is made to overturn an existing construction of one of these rules. 382 U.S. at 168.

ARGUMENT

A TRIAL JUDGE MAY NOT SUMMARILY SENTENCE A PERSON WHO RESPECTFULLY REFUSES TO TESTIFY TO SIX MONTHS IN PRISON

As recently as last June, this Court again recognized that, while trial courts may have the power to punish certain contempts summarily, without notice or hearing, " '[s]ummary punishment always, and rightly, is regarded with disfavor' ", *Taylor v. Hayes*, ____ U.S. ____, 94 S.Ct. 2697, 2703 (1974) (Quoting *Sacher v. United States*, 343 U.S. 1, 8 (1952)). A review of the development of the law of contempt establishes that considerations of "due process" preclude the use of summary contempt power where, as here, the contempt involves an orderly refusal to testify and that Rule

42(a) was not intended to authorize summary punishment in such circumstances.

The power of the Court to punish certain contempts summarily was established by this Court's decision in *Ex Parte Terry*, 128 U.S. 289 (1888), in which the Court sustained the summary punishment of an individual who had been involved in an altercation with a marshal in the courtroom. Although the assertion of the Court in *Terry* that the power to punish summarily was well established at common law has been seriously questioned, its holding that there is such a power in certain cases has never been overruled. See *Bloom v. Illinois*, 391 U.S. 194, 198 n. 2 (1968); Fox, *The Summary Process to Punish Contempt*, 25 L.Q.Rev. 238 (1909); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers*, 37 Harv.L.Rev. 1010, 1042-46 (1924). Decisions subsequent to *Terry* indicate, however, that the power to punish contempt summarily is and should be limited to disruptive behavior in open court.

In *Savin, Petitioner*, 131 U.S. 267 (1889), the petitioner was held in contempt for attempting to bribe a witness waiting in a room near the courtroom. The Court found defendant's actions met the statutory requirement that the act occur in the "presence of the Court," and stated:

> "We are of the opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.

It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex Parte* Terry, 128 U.S. 289, 309; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286." 131 U.S. at 277

In *Cooke v. United States*, 267 U.S. 517 (1925), the Court analyzed the above language of *Savin* and the distinction between that case and *Terry* as follows:

"This difference between the scope of the words of the statute 'in the presence of the court,' on the one hand, and the meaning of the narrower phrase 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court,' or 'in *Facie curiae*,' on the other, is thus clearly indicated and is further elaborated in the opinion.

"We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice,' as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. *Punishment without*

issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; *but the need for immediate penal vindication of the dignity of the court created it*." 267 U.S. at 536 (Emphasis added.)

That the power to punish summarily was limited to court-disrupting misconduct was re-affirmed by this Court in *In Re Oliver*, 333 U.S. 257, 274 (1948), in which the Court reviewed the relationship of *Terry* and *Cooke* as follows:

"That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States* 267 U.S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and

punished, demoralization of the court's authority will follow.' *Id.* at 536.

"Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." 333 U.S. at 274-275.

The cases cited above refute the suggestion by the Government that summary contempt procedures are appropriate any time the alleged contempt occurs in open court (Gov. Br. p. 13), and give meaning to the language of Rule 42(a), which was not designed to change existing law but was "substantially a restatement of existing law. *Ex Parte Terry*, 128 U.S. 289, *Cooke v. United States*, 267 U.S. 517"; see Reviser's Notes, 18 U.S.C.A. Rule 42; *Offutt v. United States*, 348 U.S. 11, 13-14 (1954); *Brown v. United States*, 359 U.S. 41, 51 (1959); *Harris v. United States*, 382 U.S. 162, 165 n. 3 (1965).

Thus, even though the contempt at issue here occurred in the presence of the judge, respondent's

orderly refusal to testify did not involve such "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge", *Cooke v. United States, supra* at 536, as would justify resort to the summary procedure provided by Rule 42(a).

Here the trial judge specifically noted that in refusing to testify Bryan did not "have a chip on his shoulder toward the Court or towards me" (A. 33). Thus, there was nothing in the way Respondent Bryan conducted himself that required the immediate punishment to protect the dignity of the court.

Nor was there anything in the circumstances that required resort to summary proceeding and the immediate sentencing of Respondent. While the Government argues that immediate punishment might persuade a reluctant witness to testify, nothing that the Court said or did suggested that this was the reason for the Court's action. Indeed, since Bryan's sentence for contempt was not to begin until he finished a sentence he was then serving, and the Court indicated it would review the contempt sentence in the future, the sentence imposed had no immediate impact.* Moreover, even if it was felt that the imposition of a contempt sentence, as opposed to the citation for contempt, might have some effect on a reluctant witness, it would not have been unreasonably disruptive to delay the trial for at least 24 hours to give the witness an opportunity to confer with his counsel and prepare to respond to

*Similarly, in the case of the Respondent Wilson there was no immediate impact since he was then in custody in lieu of bail and the Court did not even increase his bail (A. 21).

the contempt charge. As Justice White said for this Court in *Taylor v. Hayes, supra* at 2704:

> "For the accused contemnor facing a jail sentence, his 'liberty is valuable and must be seen as within the protection of the [due process clause]. Its termination calls for some orderly process, however informal.' " (Quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972).)

Here Respondent Bryan was not afforded the minimal requirements of due process. He was ordered to testify and then punished for contempt at a time when his own lawyer could not be present. While the exigencies of the situation may have been such as to justify calling him as a witness and assigning another lawyer to represent him, there was no compelling necessity for proceeding to punish Bryan for contempt in the absence of his regular lawyer. The reason for having a contempt hearing is to permit the contemnor to offer facts "relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U.S. at 537; *Harris v. United States*, 382 U.S. 162, 166-167.

Given Bryan's obvious confusion as to the scope of his guilty plea and the significance of the fact that he had not requested immunity, which is reflected in the portions of the transcript quoted above, it was particularly important to give him the opportunity to consult with his regular attorney, Mr. Brown, before sentencing him to six months in jail for contempt. Mr. Brown might have been able to persuade Bryan to testify or, at least, to offer information in extenuation not known to Mrs. Hermann. Since Brown was apparently the one who had discussed the immunity

question with Bryan originally (A. 21), he might have been able to give the court a much better insight into the extent to which Bryan's refusal was based on a legitimate concern that what he testified to would be used against him at the time he was resentenced, or, perhaps, a fear of reprisal against him in prison if he testified for the Government. Certainly, a contemnor should be given the opportunity to produce such evidence before the maximum sentence is imposed on him for contempt.

It is hard to believe that the orderly functioning of the district courts would be severely hampered by a ruling by this Court that a witness, who, in a courteous manner, refuses to testify, is entitled to the procedural safeguards provided for in Rule 42(b) before he is sentenced to six months in prison. Indeed, a parade of horrors argument similar to that put forth by the Government here was rejected by this Court in *Bloom v. Illinois, supra* at 208, where the Court stated:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice . . .
>
> "We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily . . . "

Finally, note should be taken of the Government's argument that *Harris v. United States, supra*, should be overruled, and the Court should follow its earlier decision in *Brown v. United States*, 359 U.S. 41. First,

it is important to note that while *Brown* affirmed the use of summary contempt for a refusal to testify, that issue apparently was not even raised by the petitioner in *Brown*. See 359 U.S. at 48. ("petitioner does not question the power of the court to punish disobedience of its lawful order as criminal contempt, and to do so summarily, if the disobedience occurs in the presence of the Court and in the sight or hearing of the judge.") (footnotes omitted) In addition, as Justice Stewart stated for the dissenters in *Harris*:

> "The particular question at issue here is of limited importance. But in this area the Court's duty is important, involving as it does the responsibility for clear and consistent guidance to the federal judiciary in the application of ground rules of our own making. We are not faithful to that duty, I think, when we overturn a settled construction of those rules for no better reasons than those the Court has offered in this case." 382 U.S. at 168.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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